REPORTS

OF

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE STATE OF LOUISIANA.

EASTERN DISTRICT.

NEW-ORLEANS, DECEMBER, 1834.

FOUCHER *vs.* HIS CREDITORS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

An absconding debtor cannot apply for the benefit of the insolvent laws and make a surrender of his property, by an *attorney in fact.* No man can swear by proxy, unless expressly authorised by law; and the attorney in fact cannot swear, that no part of the insolvent's property has been diverted to the injury of his creditors, which is essential in the affidavit.

The judge is not authorised to order a stay of proceedings, either against the person or property of an insolvent debtor, and to accept the cession, so as to bind all the creditors, without a compliance on the part of the insolvent debtor, with the *essential* forms of law.

A person's owning a saw-mill and brick-yard, as an appendage to a sugar plantation, and selling the bricks and plank, does not constitute him *a trader*, within the meaning of the 6th section, of the act of 1826, relating to forced surrenders of property.

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This suit was instituted in the name of the plaintiff, by his *attorney in fact*, to obtain the benefit of the insolvent laws, relative to a voluntary surrender. The petition states, that the plaintiff, Antoine Foucher, jr., is a resident of the parish of Jefferson, *but now absent*, and represented by E. Faures, his attorney in fact; that owing to bad crops, payment of heavy interest, and losses, he is unable to pay his debts; he annexes a schedule of his affairs, and prays leave to surrender his property to his creditors, that it be accepted, and all other proceedings against it be stayed.

The schedule was sworn to, by the attorney in fact, and the district judge accepted the cession of the property, ordered a meeting of the creditors before a notary, and that all proceedings against the property be stayed.

After this order was granted, a portion of the creditors of Foucher, presented a petition for a forced surrender of his property, under the 6th section of the act of 1826, alleging that he is a *merchant or trader*, who has absconded or concealed himself, to avoid the payment of his debts, and praying for a meeting of creditors, in pursuance of that act.

The petition was accompanied by a motion, to set aside the former proceedings, on the following grounds:

1. That the schedule and petition are not sworn to.
2. That the petitioner had absconded, before the granting of said order.
3. That the petitioner is a fraudulent debtor.
4. The property left by said insolvent, will not be sufficient to pay one-third of his debts.
5. That a cession of property cannot be made by an attorney in fact.

The facts proved are, that the plaintiff had absconded to avoid a criminal prosecution for forgery, and was absent at the time the application was made for a surrender; that he had a sugar plantation, and a small plantation adjoining to it, near the city of New-Orleans, on the latter of which, he had a sugar-mill, saw-mill and brick-yard, the produce of which,

consisting of sugar, plank and scantling, and bricks, he was in the habit of selling, either on his plantation or in the city.

The district judge was of opinion, that the circumstance of Foucher's having a steam saw-mill and brick-yard, in connexion with his sugar plantation, and selling planks and bricks, did not constitute him a *merchant or trader*, refused the application for a forced surrender. He also considered, that although Foucher was not himself entitled to the benefit of the insolvent law, yet a surrender of the property might be made, for the benefit of his creditors; and therefore overruled the motion to set aside the order accepting the surrender. The creditors appealed.

Derbigny for the plaintiff, in support of the surrender, contended, that if the insolvent debtor acted fraudulently, or was not himself entitled to the benefit of the insolvent laws, still his property surrendered, whatever might be his fate, remains the pledge of his creditors, and is to be distributed among them.

2. It is objected by the opposing creditors, that the schedule cannot be sworn to by the attorney in fact of the debtor. This objection can go no further, than to deprive the debtor of the personal advantages resulting from the surrender; but unless it is clearly shown that the agent, in ceding the property, has violated the law, or exceeded his authority, he has vested in the creditors all the rights of the debtor, to the property surrendered.

3. The property surrendered by the insolvent debtor, may be retained by his creditors, notwithstanding his bad faith.

4. If there is no express law authorising this proceeding, the cession must be maintained on general principles of equity; for in civil matters, when there is no express law, the judge is bound to proceed, and decide according to equity. *La. Code, article* 21.

Rost, for the opposing creditors, made the following points:

1. The judgment of the District Court is unsupported and unfounded in law, and ought to be reversed, and the application of the creditors for a forced surrender admitted.

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2. The district judge should not have accepted the surrender, because the schedule was neither signed nor sworn to, by the ceding debtor, who had absconded.

3. The insolvent was a *trader*, within the meaning of the act of 1826, which authorises creditors to compel a forced surrender, such as that asked for in this case.

Eustis, on the same side.

1. There can be no possible danger to any interest, in construing the statute of 1826, as a remedial statute. It can only take effect on the absconding of the debtor, when he virtually abandons his property to his creditors.

2. The act of 1826 was enacted, to prevent the mischiefs of the old law, and to carry out and give effect to the principle, that the property of the debtor is the common pledge of his creditors, to divide justly and equally among all, the property derelict, and to ensure order and certainty in the distribution.

3. This law is made applicable to merchants and traders alone. The planter is attached to the state, and cultivates the soil, is the last to abandon it, and is but rarely effected by the vicissitudes of trade.

4. The words merchant and trader, are used in the insolvent act, as forming a part of our insolvent system. They are used in the sense they are understood, in insolvent or bankrupt laws; are technical terms, and used in a technical sense. "Terms of art, or technical terms and phrases, are to be interpreted according to their received meaning and acceptation with the learned, in the art or profession to which they refer." *La. Code, article* 15.

5. This is the case of an absconding debtor, who had on his plantation, saw-mills and a brick-yard. He bought rafts and lumber for his mills, and sold his planks and bricks in the country and city. Either of these branches of industry would constitute him a trader, in the legal sense. Even the business of brick-making, if carried on separately and independently, though it be combined with other pursuits, makes the party a *trader*. *Eden on Bankruptcy, p.* 5. *Cooke on Bankrupt Law*, 49.

6. By his saw-mills, Foucher became a trader. He bought lumber, converted it into plank, and sold it. On this principle, carpenters and shipwrights, purchasing the raw materials, and converting and manufacturing them into articles for sale, were held to be traders. *Eden on Bankruptcy, page* 8.

7. All persons buying the raw materials of trade, and selling them again under another form, or improved by manufacture, have always been held, under the English bankrupt laws, to be traders. *Eden on Bankruptcy, p.* 9. *Cooke,* 49.

8. The variety of the transactions of the debtor, as disclosed in his bilan, shows that his affairs were more of a mercantile than an agricultural character. 12 *Martin,* 27.

Bullard, J., delivered the opinion of the court.

In this case it appears, that the plaintiff Foucher, had, through the agency of an attorney in fact, offered to make a cession of his property, for the benefit of his creditors, and that the judge of the District Court accepted the surrender, ordered a meeting of the creditors, and a stay of all proceedings against the property only.

Certain creditors came forward, and moved the court to set aside the order, accepting the surrender, and for a meeting of creditors, on the following grounds:

1. That the petition and schedule are not sworn to.

2. That the petitioner had absconded, before the granting of said order.

3. That the petitioner is a fraudulent debtor.

4. That the property left by said insolvent, will not be sufficient to pay one-third of his debts.

5. That a cession of property cannot be made by an attorney in fact.

The District court maintained its first order, and the opposing creditors appealed.

The act of 1817, relative to the voluntary surrender of property, requires that the debtor, who wishes to avail himself of its benefit, should present his petition, and annex to it a statement of his affairs, and the losses he has sustained, the names of his creditors, and a statement of all his property.

This schedule must be signed by the debtor, if he can write, and sworn to or affirmed. The fifth section gives the form of the oath to be taken: among other things, he is required to swear, that "he has neither directly nor indirectly, diverted any of his property, to the injury of his creditors." By the act supplementary to that above mentioned, approved March 29th, 1826, the judge, to whom such petition has been presented, in the mode and form required by the original act, is authorised to accept the cession of property.

An absconding debtor cannot apply for the benefit of the insolvent law, and make a surrender of his property, by an *attorney in fact*. No man can swear by proxy, unless expressly authorised by law; and the attorney in fact cannot swear, that no part of the insolvent's property has been diverted to the injury of the creditors, which is essential in the affidavit.

It appears to us clear, that unless the debtor complies with all the preliminary formalities required by these statutes, the judge is without authority, either to order proceedings to be stayed, or to accept the surrender. No man can swear by proxy, unless expressly authorised by law, and even if he could, an essential part of the affidavit has been omitted, to wit, that no part of the property of the debtor, has been diverted to the injury of his creditors. An absconding debtor might, without much violence, be presumed to have carried off some means with him. Whether he absconded to avoid the payment of his debts, or the punishment demanded by law for his crimes, is not material.

But it is said, that although Foucher may not be entitled to his discharge, under the insolvent laws, yet he may make a surrender to his creditors, for their common benefit, by his attorney in fact; he may surrender to them their common pledge, and that they may go on and administer it. This may be true, if the creditors all consent. But this opposition shows the dissent of a part of them; and the question is, has the district judge a right, under such circumstances, to accept the surrender for all the creditors, and to restrain them in the prosecution of the claims against the common debtor? We are of opinion, that the judge had not authority to order a stay of proceedings, either against the person or property, and to accept the cession, so as to bind all the creditors, without a compliance on the part of the insolvent, with the essential forms of law. It is true, the property of the debtor is the common pledge of his creditors, but it does not follow, that one creditor has a right to interfere in all cases, in the

The judge is not authorised to order a stay of proceedings, either against the person or property, of an insolvent debtor; and to accept the cession, so as to bind all the creditors, without a compliance on the part of the insolvent debtor, with the *essential* forms of law.

pursuit of another, to be paid out of the common fund. The law favors the vigilant, by giving to recorded judgments the rank of mortgage; and one creditor could not restrain another from proceeding to judgment, against their common debtor, under the pretext, that he would thereby obtain a preference.

The opposing creditors further asked from the court of the first instance, a sequestration of the property of Foucher, as an absconding merchant or trader, under the sixth section of the above mentioned act, of 1826. This was refused, on the ground, that the absconding debtor is not a merchant or trader. The correctness of this judgment, is also contested on the appeal.

In the year 1823, the legislature abolished the forced surrender, as it existed by the Spanish law, and restricted the right of compelling a surrender, to cases when the debtor should be in actual custody.

The act of 1826, reinstated it only in relation to merchants or traders, who should abscond or conceal themselves, in order to avoid the payment of their debts. The principal question is one of fact, is Foucher a merchant or trader, according to the true intent and meaning of the statute? The statement of facts shows, that he has a plantation at a small distance above the city of New-Orleans, where he resided; that he has thereon a sugar-mill, a great quantity of cane, and also a steam saw-mill, a water saw-mill, and a brick-yard; the sugar, lumber, and brick were sold, either on the plantation, or in the city; and that he bought rafts for said saw-mills.

A person's owning a saw-mill and brick-yard, as an appendage to a sugar plantation, and selling the bricks and plank, does not constitute him *a trader*, within the meaning of the 6th section of the act of 1826, relating to forced surrenders of property.

It is extremely questionable, whether even under the bankrupt laws of England, Foucher would be considered as a trader, within the statutes. One authority says, "a man's buying and selling, brings him not within the statutes, for they intend, such as gain the greatest part of their living thereby." *Bacon's Abr. verbo Bankrupt.* No very precise rule, has been laid down in England. But in this state, we are to take words in their usual sense. It seems to us, that having a saw-mill and brick-yard, as an appendage to a sugar plantation, and selling the brick or plank, does not

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constitute the proprietor a trader. No man perhaps ever imagined, before the absconding of Foucher, that he was a merchant or trader; and if we make one of him now, it can be done only by implication. It is impossible to say where we are to stop, if we once deviate from the broad distinction, obvious to common sense, between a planter, who profits by the labor of his slaves, and his own industry, partly in raising crops, and partly in some mechanical or manufacturing branch of industry, and the merchant or trader, who lives by buying, and selling for a gain. In the first case, it is principally labor, which affords the profit; in the second, it is capital invested and kept in circulation, without adding any value to the articles bought and sold. We think the judge did not err, in refusing the sequestration.

But it is said, if neither of these modes of proceeding is sanctioned by law, the parties are without remedy, and the property will be wasted by protracted litigation, among the creditors, and unequally distributed. We cannot help that. It is not our business to legislate, nor to remedy defective enactments of the legislature. Our judgments ought to form rather the development, than the supplement of legislation.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be reversed, so far as relates to the original order, and that the order of the court, accepting the surrender, and directing a stay of proceedings and a meeting of the creditors, be rescinded and annulled, and that the appellee pay the costs of both courts.

STEVENSON *vs.* SHIELDS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where a partnership is composed of several partners, and by the articles of agreement, one of them is to be a silent partner, the others cannot, by mutual consent, before its expiration, dissolve the partnership, without the consent of the silent partner,

Where a partner sues the acceptor of a bill, endorsed by the payee to the partnership firm, and the plaintiff sues in his own name, for the use of the firm, which he alleges, is composed of himself and another, but is dissolved by mutual consent, and it appears by the articles of partnership, there was a silent partner, who had not consented to the dissolution: *Held*, that the action cannot be maintained, because the interest of the silent partner in the bill, by the endorsement to the firm of which he was a member, could not be divested without his consent.

The moment a bill of exchange is endorsed, by the payee, to a partnership firm, it becomes the joint property of all the partners.

This is an action against the acceptor of a bill of exchange, for one thousand eight hundred and seventy-six dollars, drawn by one Page, a silent partner of the firm, in behalf of which the plaintiff sues.

The plaintiff sues for the use of the late firm of J. G. Stevenson & Co., which he alleges, was composed of himself and one M'Carty, and had been dissolved by mutual consent.

The defendant pleaded a general denial.

The articles of partnership, which were produced in evidence, showed that the firm of John G. Stevenson, & Co., was composed of J. G. Stevenson, P. M'Carty and S. K. Page, the latter a silent partner. The notice of dissolution showed it was made before the partnership expired by its own limitation, and *without* the consent of the silent partner. The bill of exchange sued on, was endorsed by the payee to the *firm* of J. G. Stevenson & Co.

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The district judge, after examining the evidence of the case, was of opinion, the firm of Stevenson & Co. had not proved property in the bill, or shown they paid a valuable consideration therefor: gave judgment of non-suit. The plaintiff appealed.

Sterrett, for the plaintiff.

1. It was not necessary to prove ownership of the bill sued on, as it is endorsed to the firm, in behalf of which the plaintiff sues, and because the ownership was not specially denied, and the possession is not alleged to be illegal.

2. It was not necessary to show the consideration which was paid for the bill, as it is not specially denied or pleaded.

3. The plea of payment set up on the trial, comes too late, and cannot avail. There is no evidence of payment to either of the ostensible partners of said firm.

Worthington, contra.

Bullard, J., delivered the opinion of the court.

The plaintiff sues in his own name, for the use of the late firm of J. G. Stevenson & Co., composed of himself and P. M'Carty, upon a bill, of exchange, drawn upon the defendant, by him accepted, and protested for non-payment, at its maturity.

The defence set up in the answer, is that the defendant is not liable, in the manner and form stated in the petition, and that the plaintiff exhibits no right or title to maintain the action.

Where a partnership is composed of several partners, and by the articles of agreement one of them is to be a silent partner, the others cannot by mutual consent, before its expiration, dissolve the partnership without the consent of the silent partner.

The bill was drawn by page, payable to the order of Commayer, and by him endorsed in full to John G. Stevenson & Co. We leave out of view the subsequent endorsement to Sprague, cashier, because it is not an endorsement by Stevenson & Co., but by J. G. Stevenson alone.

The view which we have taken of the right of the plaintiff, to maintain the present action, according to the conditions of the partnership, and its subsequent alleged dissolution by mutual consent, renders it unnecessary to

examine other questions, raised in the argument, and the several grounds filed, upon which the appellant seeks to reverse the judgment of non-suit, rendered below.

The articles of partnership are signed by Stevenson, M'Carty and Page, and the style of the firm composed of those three partners, is declared to be J. G. Stevenson & Co. They agree upon a division of profits, in different proportions, between the three partners, and the firm was to continue until the 1st of July, 1834, unless sooner dissolved by mutual consent. By the seventh article, it was provided, that Page should have "the privilege of being a silent partner in the firm; he will not be required to direct his attention *openly*, to the business in New-Orleans, but he will, during his absence from, as well as during his residence in the city, do all in his power to procure business, that may be considered profitable to the firm," &c.

Page was, in the opinion of the court, a partner, without whose consent the firm could not be dissolved, before the time limited by the agreement. The notice of dissolution adduced in evidence, is signed only by the two other partners. The interest of Page in the bill of exchange, under the endorsement to J. G. Stevenson & Co., could not be divested without his consent, and accrue, as alleged by the plaintiff, to the conclusive benefit of Stevenson and M'Carty, although Page himself, in his individual capacity, was the drawer of the bill. The moment it was endorsed to the firm, it became the joint property of all the partners.

The plaintiff does not, therefore, show a right, either in himself, or those for whose use he sues, to recover the amount of the acceptance.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

Where a partner sues the acceptor of a bill endorsed by the payee to the partnership firm, and the plaintiff sues in his own name for the use of the firm, which he alleges is composed of himself and another, but is dissolved by mutual consent, and it appears by the articles of partnership there was a silent partner who had not consented to the dissolution: *Held*, that the action cannot be maintained, because the interest of the silent partner in the bill by the endorsement to the firm of which he was a member could not be divested without his consent.

The moment a bill of exchange is endorsed by the payee, to a partnership firm, it becomes the joint property of all the partners.

MADAME GOTTSCHALK *vs.* HER CREDITORS.

APPEAL FROM THE PARISH COURT FOR THE CITY AND PARISH OF NEW-ORLEANS.

A married woman, separated in property from her husband, and who is not even a public trader or merchant, has the right to claim the benefit of the insolvent laws, which authorise a cession of property, for the benefit of creditors, by a debtor in embarrassed and insolvent circumstances.

The plaintiff alleges, she is separated in property from her husband, and that owing to many losses, and diminution in the value of her property, she is unable to pay all her debts. She annexes a schedule of her affairs, and prays that she be allowed to make a cession of her property, for the benefit of her creditors, and a meeting of them be called; and that all proceedings against her person and property, in the mean time, be stayed.

The schedule was sworn to, and the usual affidavit made. The judge accepted the surrender. Abat and Delachaise, who were judgment creditors, appealed.

Rouwert, for the plaintiff, contended:

1. That by the first and second sections, of the act of February 20th, 1817, and by the first and second sections, of the act of March 29th, 1826, every individual, every insolvent debtor, not imprisoned for debt, can avail himself of the benefit of said acts, that in no part of said acts, is there any exception, express or implied, which excludes free women, who are not public trading women, from the benefit of said acts.

2. That by the fortieth section, of the act of 1817, it is expressly declared, that "no free girl or woman shall be imprisoned for debt, nor in virtue of this act, unless she be a public trading woman, or in consequence of some crime or misdemeanor," which express exception in favor of women,

not public trading women, liberating them from a part of the provisions of said act, clearly shows that the balance of said act, is fully applicable to them, and that they have the right to receive the full benefit thereof.

D. and J. Seghers, for the appealing creditors:

1. Neither the provisions of the act of the 20th February, 1817, relative to the voluntary surrender of property, or the supplemental act thereto, of March 29, 1826, are applicable to women, unless they are public traders or merchants.

2. The fortieth section of the act of 1817, provides, that women cannot be imprisoned, and consequently they do not come within the meaning of the 1st, 2d, or 27th sections of said act, nor within the 1st section of the act of 1826.

3. Women cannot be subjected to the provisions of the 9th or 21st sections of the act of 1817, providing against fraud, or concealment of the person or property of the debtor from the creditors, and for punishing it.

4. The Spanish law, relating to a forced surrender, would have applied to this case, but these laws were repealed by legislative enactment, in 1823. See 2 *Moreau's Digest*, 436.

5. The laws of Rome and Spain, exempted women from imprisonment for debt. The same provision exists in France, except as to women who are public traders. *Novelle*, 134, *ch.* 9. *Merlin's Repertoire, verbo contrainte par corps, No.* 1 *and* 16. *Law of Toro*, 62. *Febrero ad., part* 2, *b.* 3, *ch.* 2, *No.* 160.

6. According to these laws, it will appear, that the sole object of the judicial surrender, being to liberate the debtor from imprisonment, this privilege does not apply to women. *Febrero ad., part* 2, *b.* 3, *ch.* 3, *No.* 1 *and* 2. *Leclerey, droit Romain comparé au droit Français, vol.* 4, *p.* 144, 371.

Mathews, J., delivered the opinion of the court.

The only question presented by this case, appears somewhat novel. It is, whether a woman, not a public trader or merchant, has a right to claim the benefit of our insolvent laws, which authorise a cession of property, for the

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benefit of creditors, by a debtor who may find himself in embarrassing circumstances? This question was decided in the affirmative, by the court below, from which the opposing creditors took the present appeal.

The legislative acts of the state, which are the only laws in force, since 1828, on the subject now under consideration, make no distinction, as to the right of debtors to surrender their property, on the score of sex. But it is contended, on the part of the appellants, that in consequence of the humane and gallant disposition of our laws, which exempt women from imprisonment, on account of contracts, they are not entitled to the benefits secured to honest and unfortunate debtors, by a *cessio bonorum.*

Such interpretation, would certainly exhibit palpable discordance with that benevolent feeling, which dictated the rule, exempting women from personal arrest and imprisonment, on account of civil obligations, and unless the law be express and imperative in denying this right, it ought not to be so construed as to produce such an incongruous effect.

The reasoning in favor of the negative proposition, that women have no right, under our laws, to make a surrender of their property, for the benefit of their creditors, as used by the advocate in the present instance, is somewhat syllogistic in form. The insolvent laws, as shown by the 1st section of the act of the 20th March, 1817, and by the provisions of the act of 1826, on the same subject, were passed for the purpose of enabling debtors to avoid imprisonment, by surrendering their property, &c. A woman cannot be imprisoned, on account of her debts; therefore a woman has no right to make a surrender.

This mode of reasoning certainly receives aid from the maxim *cessante ratione cessat et ipsa lex*; and were it shown, that this is the sole benefit and relief intended by these laws, the reasoning would be very forcible, if not conclusive. But, on reading the section of the act referred to, the cession of goods has the effect, not only to prevent imprisonment, it also releases the debtor from all proceedings against his

person. This latter clause, if it have any meaning different from the exemption from imprisonment, must mean a release from all personal actions; so that a person, who does all things in his power to pay his creditors, by a fair surrender of property, may not be harrassed by a multiplicity of suits. This in truth, under circumstances of impossibility to make payment of all his debts, by a debtor, is the only means of giving effect to that provision of our code, which declares the property of a debtor to be a common pledge to all his creditors. The effects of a surrender of property, in practice, has always been, to stop all judicial proceedings against the ceding debtor, except such as are carried on in the *concurso*.

We are unable to perceive any cogency in the reasoning, based on the impossibility of punishing a woman, ceding her property as a debtor, by imprisonment, on account of fraud in the surrender. The same difficulty would exist, in making her act honestly, in pursuits by creditors separately, when she refused to make a cession of her property. Indeed, a willingness shown, to give all up for the benefit of the mass of creditors, is at least *prima facia* evidence of honesty and fair dealing.

A married woman, separated in property from her husband, and who is not even a public trader or merchant, has the right to claim the benefit of the insolvent laws, which authorise a cession of property, for the benefit of creditors, by a debtor, in embarrassed and insolvent circumstances.

The law does not positively and expressly inhibit women from surrendering their property to creditors, neither can such inhibition be made out, by just reasoning from the context of the law.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs, to be paid by the appellant.

STATE *vs.* JUDGE WATTS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The judicary act of 1789, while it gives to the federal courts, exclusive original cognizance, of all civil causes of admiralty and maritime jurisdiction, reserves to parties, in all cases, the right of a common law remedy, when the common law is competent to give it.

The states are prohibited from establishing courts, having cognizance of cases of admiralty and maritime jurisdiction, according to the course of proceedings in courts of admiralty, but if parties choose to sue upon their contracts, according to the rules of practice established by law, in courts of general jurisdiction, instead of proceeding summarily, by motion or *in rem*, in the admiralty courts, there is nothing in the constitution which prohibits them.

The adjustment of accounts, among part owners of ships, relating to profits, is a matter of chancery, and not admiralty jurisdiction, in England.

According to the laws of Louisiana, the adjustment of profits and settlement of accounts, among joint owners of ships, is a necessary incident to the action of partition.

Admiralty courts, in the United States, may, in some cases, have ordered a sale of vessels, at the suit of part owners, but it does not follow, as a necessary consequence, that the state courts are without jurisdiction in the same matters.

So the part owner of a vessel, within the jurisdiction of the state courts of general jurisdiction, may institute suit therein, to compel a partition of his interests, and recover a balance for advances made, by a judicial sale or licitation of the vessel, even when such co-proprietor resides out of the state.

This case commenced by an application for a mandamus, to compel the judge of the First Judicial District, to entertain jurisdiction of a certain suit, instituted in his court.

The record shows, that Levi H. Gale, filed his petition in the District Court, alleging that he was one-fourth owner of the ship Atlantic, then lying in the port of New-Orleans, and

that Isaac Purrington, residing in the state of Maine, was owner of the remaining three-fourths; that Purrington was indebted to him in the sum of four thousand three hundred and twenty-seven dollars, for advances made, on account of said vessel. He prays for a partition of his interest, by a sale or licitation of the ship, after an inventory, and appraisement is made; that a *curator ad hoc* be appointed to defend Purrington, and that he have judgment against him for his aforesaid claim.

The district judge endorsed on the petition, that he considered this case as belonging, exclusively to the courts of admiralty, and declined its jurisdiction.

A rule was taken on the judge, to show cause why a mandamus should not issue. The judge returned for answer, that he viewed the subject matter in litigation, as exclusively of admiralty and maritime jurisdiction, and that under the constitution and laws of the United States, original cognizance of all civil causes of admiralty and maritime jurisdiction, appertained exclusively to the courts of the United States. In support of this opinion, he cited the constitution of the United States, and laws, and referred to *Conklin's Practice in United States Courts, page* 141 *to* 150, *and note to page* 148. *Bee's Admiralty Reports*, 2.

Slidell, in support of the rule, contended, that the action of partition lies between all parties who may hold property in common, from whatever cause it is so held. *La. Code, art.* 1231.

2. Under the general admiralty law, one-part owner, cannot compel the other part owners of a vessel, to sell their shares. *Abbott on Shipping, page* 90–91.

3. If the courts of the United States, in the exercise of their admiralty jurisdiction, have the power to compel the sale of a vessel, on the application of a part owner, this jurisdiction, in such matters, is not exclusive; it may be exercised by the state courts, if permitted or authorised by the local law. 1 *Kent's Commentaries, page* 351–2.

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Bullard, J., delivered the opinion of the court.

A rule having been taken on the judge of the First Judicial District, to show cause why a *mandamus* should not issue, commanding him to make certain preliminary orders, in the case of Gale *vs.* Purrington, he shows for cause, that he considers the subject matter to be adjudicated upon, as exclusively of admiralty and maritime jurisdiction, and that under the constitution and laws of the United States, the exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, appertains to the courts of the U. States.

In order to ascertain the precise question, of which the district judge declined to entertain jurisdiction, we must recur to the petition presented to him in the first instance. Here we are then to inquire, whether the cause of action, as set forth, be one of admiralty and maritime jurisdiction, and if so, whether it be of that class of cases, of which exclusive cognizance has been granted to the federal judiciary, by the constitution and laws of the United States.

The plaintiff, L. H. Gale, sets forth in his petition, that he is proprietor in common with Isaac Purrington, of the state of Maine, of a ship or vessel called the Atlantic, of which Purrington owns three-fourths, and the plaintiff the other fourth. That the ship is now within the jurisdiction of the court. That the petitioner is unwilling to remain longer in a state of indivision with his co-proprietor, and that no other means exist of effecting a partition of their interests, than by a judicial sale or licitation. He further represents, that Purrington is largely indebted to him, for advances and disbursements made on account of the ship for which suit is now pending; and he finally prays for the appointment of a curator *ad hoc*, to represent the absent defendant, that an inventory and appraisement may be made in due form of law, and that the vessel may be sold, after due notice, and that he may be paid for his advances, out of the share of his co-proprietor.

The action, therefore, is one of partition, and the object to be partaken, is a registered vessel, belonging in different proportions to part owners, citizens of different states, and the

question is, not whether the owner of a minor share, can, at any time, compel a severance of their joint interests, but whether the state courts are forbidden to take cognizance of such a question, by the constitution of the United States.

The constitution declares, that the judicial power of the union, shall extend to certain classes of cases, not now necessary to enumerate, and among others, "to all cases of admiralty and maritime jurisdiction." It is now generally conceded, that this grant of power, does not necessarily and in all cases, confer exclusive jurisdiction on the courts of the United States, but that the state courts retain, in many of the enumerated cases, concurrent jurisdiction in the first instance. The first judiciary act, organising the federal courts, provides for the manner in which the decisions of state courts may be reversed by writ of error to the Supreme Court of the United States, and for the removal of causes for trial, in the first instance, in certain cases, on the defendants complying with certain formalities. Whether the constitution has vested the federal tribunals, with exclusive cognizance, of all cases of admiralty and maritime jurisdiction, is a question upon which distinguished commentators entertain different views. Judge Story, in his commentaries on the constitution, divides the cases of admiralty and maritime jurisdiction, into two great classes; "one dependant upon locality, and the other upon the nature of the contract. The first, respects acts or injuries done upon the high seas, where all nations claim a common right and common jurisdiction, or acts or injuries done upon the coast of the sea, or at farthest, acts and injuries done within the ebb and flow of the tide. The second, respects contracts, claims and services, purely maritime, and touching rights and duties appertaining to commerce and navigation. The former is again divisible into two great branches, one embracing captures and questions of prize arising, *jure bele*, the other embracing acts, torts and injuries, strictly of civil cognizance, independent of belligerant operations." 3 *Story's Com.* 527 *and seq.*

Another class respects contracts, claims and services purely maritime; such as the claims of, material, men, and others

for repairs and outfits of ships, belonging to foreign nations, or to other states; bottomry bonds, for moneys lent to ships in foreign ports; surveys of vessels damaged by perils of the seas; pilotage on the high seas, and suits for mariners' wages, He adds, that, "in many of the cases included in these latter classes, the same reasons do not exist, as in cases of prize for an exclusive jurisdiction, and therefore, whenever the common law is competent to give a remedy in the state courts, they may retain their accustomed concurrent jurisdiction in the administration of it." *Ibid.* 533.

The judiciary act of 1789, while it gives to the federal courts, exclusive original cognizance, of all civil causes of admiralty and maritime jurisdiction, reserves to parties, in all cases, the right of a common law remedy, when the common law is competent to give it.

The states are prohibited from establishing courts, having cognizance of cases of admiralty and maritime jurisdiction, according to the course of proceedings in courts of admiralty, but if parties choose to sue upon their contracts, according to the rules of practice established by law, in courts of general jurisdiction, instead of proceeding summarily, by monition or *in rem*, in the admiralty courts, there is nothing in the constitution which prohibits them.

On the other hand, it would appear to be the opinion of Chancellor Kent, and of Mr. Rawle, that the jurisdiction of the federal courts, in cases of that kind, is necessarily exclusive. 1 *Kent's Com.* 351. *Rawle on the Constitution*, 202.

These opinions are, however, strongly combatted by the able and distinguished commentator first named, who remarks, that, "the reasonable construction of the constitution, would seem to be, that it conferred on the national judiciary, the admiralty and maritime jurisdiction, exactly according to the nature and extent, and modifications, in which it existed in the jurisprudence of the common law. Where the jurisdiction was exclusive, it remained so; where it was concurrent, it remained so. Hence, the states could have no right to create courts of admiralty as such, or to confer on their own courts the cognizance of such cases, as were exclusively cognizable in admiralty courts. But the states might well retain, and exercise the jurisdiction, in cases of which the cognizance was previously concurrent, in the courts of common law." 3 *Story's Com.* 533, *in notes.*

Such, we believe, to have been the construction put upon the constitution, by the first congress, who enacted the judiciary act of 1789, which, while it gave to the federal courts, exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, reserves to parties, in all cases, the right of a common law remedy, where the common law is competent to give it. The states are prohibited from establishing courts, having cognizance of cases of admiralty and maritime jurisdiction, according to the course of pro-

The adjustment of accounts, among part owners of ships, relating to profits, is a matter of chancery, and not admiralty jurisdiction, in England.

According to the laws of Louisiana, the adjustment of profits and settlement of accounts, among joint owners of ships, is a necessary incident to the action of partition.

Admiralty courts, in the United States, may, in some cases, have ordered a sale of vessels, at the suit of part owners, but it does not follow, as a necessary consequence, that the state courts are without jurisdiction in the same matters.

So the part owner of a vessel, within the jurisdiction of the state courts of general jurisdiction, may institute suit therein, to compel a partition of his interests, and recover a balance for advances made, by a judicial sale or licitation of the vessel, even when such co-proprietor resides out of the state.

ceedings in courts of admiralty; but if parties choose to sue upon their contracts, according to the rules of practice established by law, in courts of general jurisdiction, instead of proceeding summarily, by monition or *in rem*, in the court of admiralty, we see nothing in the constitution which prohibits it; always reserving to the defendant, if he be a citizen of a different state, the right of having the cause removed to a court of the United States. Whether the case now under consideration, would be regarded in England, where the distinction between courts of admiralty, and courts of common law and equity, is clearly defined, as one of admiralty jurisdiction, is extremely questionable. Indeed it is said by Abbott, in his Treaties on Shipping, that the court of admiralty, cannot, in any case, compel any of the part owners, to sell their interest, but may protect the interest of the minority of part owners, by ordering security to be given; or taking a stipulation, as it is termed. Even that authority was long questioned, but it seems now to be settled. In a case, which is said to have terminated the controversy in England, the chief justice declared, "I have no doubt, but the admiralty has a power in this case, to compel a security, and this jurisdiction has been allowed to that court, for the public good. Indeed, the admiralty has no jurisdiction to compel a sale; and if they should do that, you might have a prohibition after sentence, or we may grant a prohibition against selling, or compelling the party to sell or to buy the shares of others." *Abbott on Shipping*, 74.

The adjustment of accounts among part owners of ships, relating to profits, is a matter of chancery and not of admiralty jurisdiction in England. Such adjustment or settlement of accounts, is according to our law, a necessary incident to the action of partition. The admiralty courts in the United States, may, in some cases, have ordered a sale of vessels, at the suit of part owners, as was done by the judge of the district of South Carolina, in the case to which our attention has been called, in 2 Bee's Reports, but it does not appear to us to follow as a necessary consequence, that the state courts are without jurisdiction of a case like the present. We are

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therefore, unable to concur in opinion, with our brother of the District Court, that the subject matter of this suit, is exclusively of admiralty jurisdiction.

Let the rule be made absolute.

BRIDGE & VOSE *vs.* MERLE ET ALS.

APPEAL FROM THE PARISH COURT FOR THE CITY AND PARISH OF NEW-ORLEANS.

Where an appeal bond is executed, for one-half more than the amount of the judgment appealed from, and filed within ten days after the rendition of judgment, the appeal is suspensive as well as devolutive.

The jurisdiction of the appellate court attaches, as soon as the appeal bond is filed, and the court *a qua* has no longer authority to take any steps in the case, except such as are necessary to transmit and bring up the record.

An appeal must be made returnable within the next term of the Supreme Court, after it is taken, if there is time to cite the appellee; if not, then to the subsequent term thereafter. But the judge *a quo* cannot by a second order, extend the return day of the appeal, on the ground that the first day fixed, is not a judicial day.

When the term, to which a cause is made returnable, fails, the appellant may well file the transcript at the next term, within the *three judicial days after the return day;* but the citation must be regular to the return day, and the service in time.

The plaintiffs are appellants from a judgment, dismissing their claim and suit, and which gave to a seizing creditor, the sum claimed in the petition. They took *a suspensive* appeal, on the 26th June, 1834, returnable to the third Monday of July following, but no citation of appeal issued,

or was served on the appellee. On the third Monday of July, the appellants presented a petition to the parish judge, praying an extension of the return, which was fixed on the fourth Monday of November, to which day the appellee was cited accordingly.

Slidell, for the appellee, took a rule on the appellants, to show cause why the appeal should not be dismissed, for not having been filed in time.

2. The return day fixed by the judge, was the third Monday in July, and the record was not filed until the 24th November following.

3. No citation was issued, or served to the return day first fixed, as is required by law. The order extending the return day, is a nullity, and the appeal must be dismissed.

Hoffman, for the appellants, contended, that the want of a regular citation, did not require the appeal to be dismissed; but that the court might order an alias citation to issue. Several cases have been decided on this principle.

2. If the law authorises an alias citation, instead of a dismissal, the court will not compel the party unnecessarily, to be at the expense of a second appeal.

3. It is made the duty of the clerk, to issue the citation of appeal. If he fails, ought the party to suffer? *Code of Practice*, 582.

4. The party ought not to suffer for the negligence of the officers. The least the court can do, is to continue the cause, and order an alias citation. This they have done, and allowed the appellant to take out a new citation. 5 *Martin*, 500. 6 *Ibid.*, 1. *Vide sec.* 9, *judiciary act of* 1813. 1 *Martin's Digest*, *p.* 438, 440.

5. The Code of Practice has made no change in this rule or principle. The law is the same now, as it was when those decisions were made.

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Bullard J., delivered the opinion of the court.

The appellee moves to dismiss this appeal, on the ground, that it has been irregularly brought up, not having been filed in time.

Judgment was rendered on the 18th of June, and on the 26th, a petition of appeal was presented; the appeal allowed, on the appellant giving bond with security, in the sum of fifteen thousand dollars; appeal made returnable on the third Monday of July following. On the same day a bond was filed, in conformity to the order of the judge.

Where an appeal bond is executed, for one-half more than the amount of the judgment appealed from, and filed within ten days after the rendition of judgment, the appeal is suspensive as well as devolutive.

The jurisdiction of the appellate court, attaches, as soon as the appeal bond is filed, and the court *a qua*, has no longer authority to take any steps in the case, except such as are necessary to transmit and bring up the record.

The effect of this order is first to be considered. The appeal had been taken, and bond given, within ten days after the rendition of the judgment. It was consequently suspensive as well as devolutive. The jurisdiction of the appellate court attached, as soon as the bond was filed; and the court of the first instance, had no longer authority, to take any steps in the case, except such as are necessary to transmit the record to the appellate court. That principle has been uniformly recognised by this court. 6 *Martin, N. S.* 464. 8 *Ibid.*, 440. 4 *La. Reports*, 205.

If a citation of appeal had been issued, in pursuance of the order, returnable on the third Monday of July, it would have appertained to this court, to decide whether a proper return day had been fixed by the judge. But no such citation issued. On the contrary, the citation in the record, requires the appellees to appear on the fourth Monday of November.

After the bond had been filed, and the appeal allowed, to wit: on the 14th of July, the appellant applied by supplemental petition of appeal, to the parish judge, representing that there was not sufficient time, to take up the appeal as ordered, and praying an order, extending the time for taking it up. An order was accordingly given, extending the return to the fourth Monday of November, and on the 7th of November following, a citation was issued accordingly.

The Code of Practice, article 574, makes it the duty of the judge, allowing the appeal, to fix the day on which it shall be returned, and in fixing the day, he is to be guided

An appeal must be made returnable within the next term of the Supreme Court, after it is taken, if there is time to cite the appellee; if not, then to the subsequent term thereafter; but the judge *a quo* cannot, by a second order, extend the return day of the appeal, on the ground that the first day fixed is not a judicial day.

When the term to which a cause is made returnable fails, the appellant may well file the transcript at the next term, within the *three judicial days after the return day;* but the citation must be regular to the return day, and the service in time.

by article 583, which provides that "the appellee must be cited to appear before the court of appeal, at its next term, if there be sufficient time for doing so, after allowing the same delay which is granted to defendants in ordinary cases; and if there be not sufficient time to admit of the appellee having this delay, owing to the distance from his domicil to the place where the court of appeal is held, he shall be cited to appear before the same, at the subsequent term."

The return day must, therefore, be within the term next to the time at which the appeal is allowed, if there be time to give the appellee the legal delay, considering his distance from the court; if not, then within the subsequent term. From the 26th of June, to the third Monday of July following, a day within the July term of this court, there was sufficient time, although the appellant may not have had time, on the 14th of July, when the supplemental petition was filed, to cite the appellee for the third Monday of the same month. We are bound to regard the second order of the judge as a nullity.

But it is contended, that as the court adjourned early in July, and was not in session on the third Monday, the return day might well be extended to the subsequent term, and was in fact extended, by operation of law. In the case of Rost *vs.* St. Francis Church, the court held, that when the term failed entirely, the appellant might well file the transcript at the next term, within the three first judicial days, after the return day fixed by the order of appeal. 5 *Martin, N. S.* 191.

But in that case the citation was regular, and the service in time; in this no citation issued, in conformity to the order of the judge. If it had, the appellants might well have filed the transcript, within the first three judicial days after the return day; but the judge was not authorised to extend the return day, on the supposition that the one first fixed by him, would not be a judicial day.

It is, therefore, ordered, that the appeal be dismissed, at the costs of the appellants.

POWELL *vs.* SINNOTT.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where the plaintiff has been allowed two hundred and fifty dollars, as a referee to adjust the accounts of an estate, he cannot recover of the syndic, a commission on the amount of the estate so adjusted, when there is no evidence, of any extraordinary services having been rendered by him.

This is an action, to recover of the defendant, as syndic of the estate of James Lambert, five per cent. commission, on forty-four thousand seven hundred and sixty-three dollars, as a compensation for his services, in arranging, settling and adjusting the accounts of said estate. He alleges, he was employed by the defendant, expressly to perform this service, and that he is entitled to demand the commission claimed.

The defendant pleaded a general denial; and that the syndics had rejected this claim, as not authorised, and refused to put it on the tableau, which was homologated without any opposition from Powell. He denies that he is personally liable, and prays to be dismissed.

The evidence showed, that the plaintiff had been allowed two hundred and fifty dollars, on the tableau of distribution of Lambert's estate, by the syndics, as a referee.

The plaintiff produced in evidence, a paper, purporting to be a statement of the account and amount of Lambert's estate, signed "James Powell for syndics," by which it appeared, the estate amounted to forty-four thousand seven hundred and sixty-three dollars. On this sum he claims the commission sued for. There is no evidence of any other service being rendered. He made no opposition to the tableau filed by the syndics, on account of the claim.

There was a verdict and judgment for the defendant. The plaintiff appealed.

Keene, for the plaintiff and appellant.

Hennen, contra.

Bullard, J., delivered the opinion of the court.

This suit was instituted by the plaintiff, to recover of the defendant, in his individual capacity, compensation for services, alleged to have been rendered by him, in arranging and adjusting for final settlement, complicated and intricate accounts of an estate, of which the defendant claimed to be, and was acting as syndic, which services were rendered at the request of the defendant. The defendant puts in the general denial, and further pleads, that he is not personally liable; that he acted as syndic, jointly with T. Bickel, now deceased, and that the plaintiff presented his claim for services, to the syndics, who disallowed it, and refused to put it on the tableau, which was finally homologated, without opposition on the part of the plaintiff.

The case was submitted to a jury, in the court below, who found a verdict for the defendant, and the plaintiff appealed, without any effort to procure a new trial.

Where the plaintiff has been allowed two hundred and fifty dollars, as a referee to adjust the accounts of an estate, he cannot recover of the syndic a commission on the amount of the estate so adjusted, when there is no evidence of any extraordinary services having been rendered by him.

The evidence shows, that the plaintiff was allowed, on the tableau of distribution, a sum of two hundred and fifty dollars, as one of the referees, in a case in which the estate was interested, and the account made out by him, and signed "for syndics," refers to the same case. But we find no evidence in the record, of the extraordinary labor and pains, bestowed on the investigation of complicated accounts, upon which the plaintiff rests his right to recover in this case, and nothing which authorises us to disturb the verdict.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

GORMLEY ET AL. *vs.* OAKEY ET ALS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

In a sale *per aversionem*, with reference to known definite boundaries, they will control the enumeration of quantity, and the purchaser is not entitled to a diminution of price, proportioned to a diminution of quantity.

So where a sale is made, with reference to a natural boundary on one side, and on the other two sides by lands of the adjoining proprietors, and the length of all the lines are given, *on a plan* annexed to the conveyance, and the whole is sold for a gross sum: *Held*, that it is a sale *per aversionem*, and the purchaser bought whatever is embraced within those limits, and nothing more, although *less* than the quantity specified as sold in the act of sale.

The vendor, when called in warranty, in a sale *per aversionem*, is not bound to make good the quantity of land, specified in the act of sale, but only the extent and quantity contained within the defined limits, by which he sold.

The vendor is not bound to warrant what he never sold; and when the vendee has not been evicted of any part of the land sold, which was conveyed by certain definite boundaries, he cannot recover of his warrantor, although the quantity actually sold, was less than that set forth in the deed.

This was originally an action of boundary, but under the pleadings, presents mixed questions of title, boundary and recourse in warranty.

The plaintiffs, William Gormley and John F. Miller, allege, they are the owners of a tract of land, in the parish of Jefferson, having three arpents, less two toises, front on Bayou des Cannes, the two lateral lines running back until they intersect, so as to contain ninety-two arpents and three hundred toises, superficial measure, which William Gormley purchased from Louis Foucher, by notarial act, the 2d of April, 1828, and which the latter obtained from Roffignac

and the executor of Cevallos, who purchased it from the Nuns, in the suburb Religieuses, by public act, dated August 9, 1810, "to whom it was confirmed by the government of the United States, with the dimensions aforesaid, according to a plan recorded in the land office, by which plan the Nuns sold to Roffignac and Cevallos, and by which they sold to Foucher, who by the same plan sold to Gormley."

The petitioners further allege, that S. W. Oakey bought a tract of land, adjoining their lower line, from Trudeau & Livaudais, and claims about forty arpents of their land, pretending that his upper line runs so as to meet their upper line, at forty-two instead of sixty-six arpents from his front. They pray that Oakey be cited, and the boundary line between them fixed by a judgment, so that Oakey's line meet their upper line, at the distance of sixty-six arpents, and give them the forty superficial arpents in dispute; and that Foucher be called in warranty, to make good to them the ninety-two arpents and three hundred toises, according to their original purchase from him, in case they fail in recovering the forty arpents in contest, from Oakey.

Foucher pleaded a general denial, admitted the sale to Gormley, and averred, that the plaintiffs have ever since been in possession of all the property he sold and conveyed, in said sale. He calls Roffignac and Cevallos, his vendors, in warranty.

Roffignac appeared, and pleaded the general issue, and prescription.

Oakey averred, he claimed no more land than his titles called for, and was willing to settle the boundary line between him and the plaintiffs, according to his titles, and at their costs. He calls Trudeau and Livaudais, his vendors, in warranty.

Livaudais pleaded the general issue, and prescription.

Upon these pleadings the parties went to trial. The respective titles were produced in evidence, and the testimony of surveyors and other witnesses, to prove the boundaries, as they had been surveyed from time to time. The

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evidence is fully set forth, in the view taken of it by the court.

The district judge after examining the evidence, came to the conclusion, that this is a disguised action, for diminution of price, by reason of a defect of quantity; that the plaintiffs have not been evicted of any thing, of which they were ever in possession; that the land purchased, was designated by the adjoining tenements, and sold from boundary to boundary; and the plaintiffs cannot recover more than is contained within the designated limits. Judgment was rendered, directing the boundary line to be run, according to the plan of Lafon, made in 1810, by which the premises were sold. The plaintiffs appealed.

Preston, for the plaintiffs.

1. The Nuns and Livaudais, established the boundary between them, and the courses of the lateral lines, of the part sold to Livaudais, which lines are demonstrated by the testimony of witnesses, (surveyors,) with mathematical certainty, to meet at ninety-two arpents from the river, or sixty-six beyond *Bayou des Cannes*, which gives the plaintiffs the quantity they claim.

2. The plaintiffs' vendor, Foucher, possessed and cultivated this tract, and had it confirmed to him by the sovereign authority of the United States government, for the quantity we purchased, and now claim as his vendees.

3. It is proved, the defendants have been in possession of a *fine* angle, for fifteen or twenty-five arpents in depth, of the land we claim. We care not for this, if they show they possessed it thirty years.

4. We claim forty arpents, to protect which, we want the boundary line run. It is swamp land, has been in the actual possession of no body, but has been constructively in our possession, according to the lines and courses given in Trudeau's survey, in 1780, and by Lafon in 1810, by the confirmation to Foucher, and all the sales afterwards.

5. The plaintiffs ask the court to fix the boundary between the parties, who both hold under a common vendor,

according to the boundary, courses and plan of Trudeau, in 1780.

Hennen, on the same side.

Peirce, *Dennis* and *Soulé*, *contra*.

Bullard, *J.*, delivered the opinion of the court.

The plaintiffs allege, that they are owners, by purchase from Louis Foucher, of a tract of land, having a front on the Bayou des Cannes, of three arpents, less two toises, and running back until the two lateral lines come to a point, containing ninety-two arpents and three hundred toises, in superficies; that the defendant Oakey, is the proprietor of the tract adjoining the above, and sets up title to about forty arpents of their land, pretending that his upper line should run so, as to touch the land of the plaintiffs, at the distance of forty-two arpents from the front, instead of sixty-six arpents, which is the true depth of their tract, according to the original titles. They pray, that he may be cited, and that a boundary line may be judicially established, between their respective lands, in such a manner, as to give the plaintiffs a depth of sixty-six arpents, and that the forty superficial arpents claimed, may be decreed to be their property. They further pray, that their vendor, Foucher, may be made a party, and that if judgment should be rendered, in favor of the defendant Oakey, they may have judgment in warranty, for twenty thousand dollars.

The defendant, Oakey, denies that he has ever claimed more land than he is entitled to, avows his readiness to establish a boundary, provided it be at the costs of the plaintiffs, and sets up title to the land claimed by him, in the neighborhood of the plaintiffs, under a sale from Livaudais & Trudeau, whom he cites in warranty.

L. Foucher, the vendor of the plaintiffs, thus cited in warranty, denies their right of action against him, and alleges, that the plaintiffs are in possession of all the land, which he sold them, and that if they ever had any right of

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action against him, for a deficiency of quantity, which he denies, it is prescribed. In his turn, he calls in his vendor and warrantor, J. Roffignac, who answers by a general denial.

This state of the pleadings, presents for the consideration of the court, mixed questions of title, boundary and recourse in warranty. The rights of the plaintiffs, as well in relation to the defendant Oakey, as to their warrantor, depend upon the true construction and legal effect of the sale, from Foucher to Gormley, on the 2d of April, 1828, and of the certificate of confirmation, on the part of the United States. We come, therefore, at once, to the examination of those two evidences of title, as forming the basis of the pretensions of the plaintiffs, to the *locus in quo*.

The act of sale declares, that Foucher sells to Gormley, "all that tract or parcel of land, situated, lying and being in the suburb Religieuses, about one mile above this city, and on the same side of the river, as per plan hereunto annexed, and signed *ne varietur*, by the said contracting parties, and me notary, measuring three arpents, less two toises, front on the Bayou des Cannes, and running back from said Bayou, about forty-two arpents, more or less, and until the two lateral lines come to a point, and touch each other, the whole composing about ninety-two arpents three hundred toises, more or less, superficial measure; bounded on one side by property heretofore owned by Pierre Rousseau, deceased, and on the other side by property, owned at present, or heretofore owned by J. E. Livaudais," &c. The price is declared to be ten thousand dollars, payable by instalments, and the vendor declares, that he purchased the same tract from Joseph Roffignac, and the executors of Ciriaco de Cevallos, by act passed before Michel de Armas, notary public, on the 17th June, 1816.

The plan referred to in the act, and identified with it, by the signature of the parties, and the paraph of the notary, represents the premises as forming a triangle, with a base of eighty-eight toises and one foot, or one-sixth, on the Bayou des Cannes, equal to three arpents, less one toise and five-

sixths, one foot more than the deed calls for, and one of the side lines, which divides the tract from the land of veuve Parvis, as measuring eleven hundred and nineteen toises, from the base near the Bayou, and nineteen hundred toises, from a point not given, but presumed to be the river.

The other line is represented as twenty-three toises shorter. The certificate of the surveyor, does not express the superficial contents, but on the face of the plan it is stated to be ninety-two arpents and three hundred toises, and the sale in question, describes it as a tract of that extent. It is manifestly impossible it can contain that quantity, according to the limits and measurements furnished by the deed itself, and the certficate of the surveyor. This error can be accounted for only, by supposing that the surveyor multiplied the whole depth of nineteen hundred toises by one half the base on the Bayou des Cannes, instead of taking the true length of the side line from the base.

In a sale *per aversionem* with reference to known definite boundaries, they will control the enumeration of quantity, and the purchaser is not entitled to a diminution of price proportioned to a diminution of quantity.

So where a sale is made with reference to a natural boundary on one side, and on the other two sides by lands of the adjoining proprietors, and the length of all the lines are given on *a plan* annexed to the conveyance, and the whole is sold for a gross sum: *Held*, that it is a sale *per aversionem*, and the purchaser bought whatever is embraced within those limits and nothing more, although *less* than the quantity specified as sold in the act of sale.

This sale appears to the court, clearly one *per aversionem*. This court has had frequently occasion to consider the principles which govern sales of that character, and it has been settled in several cases, that where a sale is made with reference to known and definite boundaries, they will control the enumeration of quantity. *Cuny* vs. *Archinard*, 5 *Martin, N. S.* 238. *Johnston* vs. *Quarles*, 3 *La. Reports*, 91. *Brand* vs. *Daunoy*, 8 *Martin, N. S.* 160.

In the case now before the court, the sale is made with reference to a natural boundary on one side, and on the two other sides by lands of the adjoining proprietors, and the length of all the lines of the triangle, are given in the plan annexed to the conveyance, and the whole is sold for a gross sum. The plaintiffs purchased whatever is embraced within those limits, and nothing more.

But the plaintiffs contend, that they have a certificate of confirmation, by the U. States, of their title, to the whole extent of ninety-two arpents and three hundred toises, and that being a title derived immediately from the sovereign, entitles them to recover that extent of land. It is true, the certificate in favor of Louis Foucher, describes the tract of land confirmed

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to him, as one of ninety-two arpents and three hundred toises, having a definite front on the Bayou des Cannes, with side lines converging to a point, without giving the length of those side lines. Taken by itself, it might be considered an abandonment of title on the part of the United States, to the superficial quantity expressed, and, as against the government, authorise an extension of the side lines, to such an extent as, with the definite front given on the Bayou des Cannes, would include that superficies. But as relates to the defendants, it may be answered: 1. That the plaintiffs in their petition allege, that the confirmation in question, was made with reference to the same plan by which the Nuns sold to Roffignac and Cevallos, and by which they sold to Foucher, and the last to Gormley. 2. That in the conveyance to Gormley, no reference is made to this certificate of confirmation, and if it really gave him, Foucher, the whole extent of ninety-two arpents and three hundred toises, yet he has never sold it to the plaintiffs. 3. The title to the whole of the Nuns' plantation, had been previously confirmed by the commissioners, and it is represented, as having a depth of only sixty-six arpents from the river, and yet, if the construction contended for by the plaintiffs be adopted, the same commissioners confirm, as a part of the same tract, a narrow strip, extending to the distance of about ninety arpents from the river.

The vendor, when called in warranty, in a sale *per aversionem*, is not bound to make good the quantity of land specified in the act of sale, but only the extent and quantity contained within defined limits, by which he sold.

The vendor is not bound to warrant what he never sold; and when the vendee has not been evicted of any part of the land sold, which was conveyed by certain definite boundaries, he cannot recover of his warrantor, although the quantity actually sold was less than that set forth in the deed.

On this part of the case, the court is, therefore, of opinion, that the plaintiffs have not shown title in themselves, to any land not embraced in the boundaries referred to in the act of sale, by Foucher to Gormley, and consequently cannot recover the forty arpents in controversy.

The remaining question, between the plaintiffs and their vendor in warranty, depends mainly on the principles already settled. The vendor is not bound to warrant what he never sold; and the plaintiffs have not been evicted of any part of the land which, according to our construction of the contract, was sold and conveyed to them, as within definite boundaries. It is true, it was declared in the deed, that the tract contained ninety-two arpents and three hundred toises, and there is a

deficiency of about forty arpents. In a case of such manifest error, an error which appears to have been common to all the parties, we are not prepared to say that the plaintiffs would not be entitled to any relief. But the only question now before the court, is one of warranty, and the liabilities of the vendor, as warrantor, must be measured by the contract of sale. Whether the purchasers, in a case like the present, would be entitled to a rescission of the sale, on the ground of error or fraud, is a question which the pleadings do not present for our solution. Whether the demand against Foucher, in the present action, be regarded as one for a diminution of price, on the ground of deficiency in the measure, or as a recourse in warranty, we are of opinion that he is not liable. Article 2471, of the Louisiana Code, declares that "there can be neither increase nor diminution of price, on account of disagreement in measure, when the object is designated by the adjoining tenements, and sold from boundary to boundary."

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

BABIN ET ALS. *vs.* WINCHESTER.

APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT, THE PARISH JUDGE, OF THE PARISH OF ASCENSION, PRESIDING.

The *procès verbal* of a sale, in which a mortgage is retained, made by the parish judge, acting as auctioneer, and duly recorded in the parish judge's office, is full evidence of the mortgage, which is binding on third possessors of the mortgaged property.

The identification of the note sued on, with a mortgage taken to secure its payment, may be shown by circumstantial and parole evidence, without the paraph *ne varietur*.

According to the rules of practice in force in 1816, which was before the adoption of the Code of Practice, a judgment by default became final, *ipso facto*, by the lapse of *three days*; and reasons are not necessary to the validity of such a judgment.

A judgment by default, which becomes final, by operation of law, does not require the signature of the judge to render it perfect and final.

In an action of warranty, prescription only runs from the date of eviction. If the action is commenced within ten years, it is in time to prevent prescription.

The action of mortgage is not barred by prescription, when commenced within ten years from the time when the debt became due and payable.

The third possessor, who is evicted, is entitled to recover of his vendor and warrantor, the value of his improvements put on the evicted premises, at the period of eviction.

This is an action of warranty, instituted by the heirs and legal representatives of Charles Babin, deceased, to recover one thousand eight hundred and seventy-five dollars, the price of three arpents of land by forty in depth, sold by the defendant to the ancestor of the plaintiffs, from which the latter was evicted, by a pre-existent mortgage. The facts of the case show, that, on the 27th April, 1813, this tract of land, then consisting of four arpents by forty, on Bayou Lafourche, was sold by order of the Court of Probates, at the instance of

the heirs of Nicholas Doublin, and E. Hernandez became the purchaser, for three thousand dollars, payable by instalments, for which he gave his notes, endorsed by Montserrat, with special mortgage. Two days afterwards, Hernandez sold the premises, by notarial act, to Montserrat, who bound himself to pay Doublin's heirs.

Montserrat paid part of the first instalment, and gave his own notes for the balance, to one Doucet, curator of one of Doublin's heirs. Afterwards, on the 30th March, 1816, the land was sold by the sheriff, to pay Montserrat's notes, and Winchester, the present defendant, became the purchaser.

On the 9th of April, 1818, Winchester sold and conveyed the land to Charles Babin, for two thousand five hundred dollars in cash, with full warranty.

In April, 1820, Babin sold one arpent front of this tract, to Ayraud, for one thousand two hundred dollars, who on the 7th January, 1823, conveyed it to Joseph Hidalgo.

On the 2d June, 1816, the second note of Hernandez, for one thousand five hundred dollars, being unpaid, the heirs of Doublin, commenced suit against Hernandez, and prayed that Winchester, who was in possession of the land, be served with a copy of the petition. On the 18th June, judgment by default was taken against Hernandez; which was entered up for one thousand five hundred dollars, and made final, without any answer being filed, on the 17th September following. The minutes of the court, under this judgment, were signed by the district judge on the same day. This was the only signing of the judgment.

On the 6th of December, 1824, Doublin's heirs, obtained an order of seizure and sale on this judgment, against Babin and Hidalgo, then in possession of the land. On the 17th January, 1825, when it was about being sold by the sheriff, Winchester, as warrantor of the third possessors, obtained an injunction to stay the executory proceeding, and on the 25th June, took a *non*-suit, with the right of producing the same matters in defence, in case he should be called in warranty.

On the 30th July, 1825, Babin and Hidalgo, obtained an injunction, and prayed that Winchester and Ayraud, their

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vendors, be called to defend the title to the premises. They appeared and filed their answers. The injunction was dissolved, and an appeal taken. The judgment of the District Court, was confirmed. See 4 *Martin, N. S.* 611.

The premises were seized and sold, according to this judgment.

On the first of February, Ayraud instituted suit against Babin's heirs, in the Probate Court, to recover one thousand two hundred dollars, the price of one arpent front, of the original tract. The heirs of Babin called Winchester in warranty, *expressly reserving their right to sue him for the remaining three arpents.*

Winchester pleaded prescription; and that Babin should have notified him of the seizure of the premises in the first instance, and legally called him in warranty, as he could then have made a victorious defence, which he stated at length.

On the 7th February, 1828, judgment was rendered in favor of Ayraud, against Babin's heirs and Winchester, which was confirmed by the Supreme Court, the 23d February, 1829. 7 *Martin, N. S.* 471.

On the 27th October, 1830, Babin's heirs brought the present suit, to recover one thousand eight hundred and seventy-five dollars, the price of the remaining three arpents in front, from which they were evicted, claiming one thousand dollars for improvements.

Winchester pleaded a general denial and prescription. He further averred, that he should have been notified of the first seizure, under the mortgage of Doublin's heirs, and called in warranty, when he could have made a victorious defence.

The following admissions were made:

1. That at the time of the seizure of the land, Babin owned three arpents, and Hidalgo one arpent.

2. That Winchester was appointed judge, in the early part of 1818.

The witnesses called, proved the improvements made on the land, were worth about one thousand dollars. One of the

witnesses proved, that Winchester told Babin, previous to the sale by the sheriff, in 1826, that if he was evicted, he might make himself easy about it, that he should not lose any thing. This testimony was corroborated by another witness.

Judgment was rendered in the District Court, by the parish judge against the defendant, and he appealed.

A. & J. Seghers, for the plaintiffs, contended:

1. That the defendant was bound by his promises made to them and proved, in consequence of which this suit was delayed from 1827, until 1830; and the plaintiffs at the same time, expressly reserved the right of suing the defendant. This alone would prevent prescription.

2. The warrantor, although not called in warranty in time by his vendee, still is bound to make good the warranty, if he does not show he had sufficient grounds to defeat the action of eviction. *Civil Code*, 357, *art*, 64. 7 *Martin*, 412, 10 *ibid*, 399.

3. The defendant was bound to explain, in his answer, the means of his defence, but which he entirely omitted, averring he would show them on the trial. This course showed his intention to take the plaintiffs by surprise, which ought not to be tolerated. Not being disclosed in the original answer, they cannot be heard here.

4. But the plaintiffs will answer the objections made in the defence, to the original mortgage of Doublin's heirs, and their judgment. *First*, the judgment is good, because the citation and service of it was legally made on the defendant, Hernandez, who is not shown to be a Frenchman, requiring the service in French language. 11 *Martin*, 301.

5. The judgment is final, the court being in session three days after it was rendered. The demand was liquidated by a note, so that the judgment only wanted signing, after three days, which was done. 2 *Mar. Dig.* 152. 4 *Martin*, 665.

6. The *procès verbal* of the sale and adjudication of the property of Doublin's estate, to Hernandez, in 1813, was a complete act of sale, a judicial sale, in which a mortgage was retained. 5 *Martin*, 372, 382–3.

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7. The original judgment against the debtor, cannot be attacked except on the grounds of *absolute nullity*, fraud or collusion. It is *primâ facie* evidence, and sufficient to support the demand against the third possessor. 8 *Mar. N. S.* 408.

8. In an action against a third possessor of mortgaged property, the creditor is not obliged to produce the evidence on which he obtained judgment against the principal debtor. 1 *Martin, N. S.* 1.

9. There is no law requiring a judgment to be signed on the back of the petition, rather than on the minutes of the court; and where judgment by default, on a liquidated demand is taken, it becomes final by the lapse of three judicial days. 4 *Martin*, 665.

10. The *procès verbal* of a sale, by a parish judge, acting as auctioneer, is a sufficient registry of the sale and mortgage retained in and resulting therefrom, when deposited in his office. He acts in this instance in the capacity of judge, auctioneer and notary. 6 *Martin, N. S.* 121. 2 *La. Rep.* 577.

11. Damages were claimed on the warranty and clearly proved, so that the plaintiffs are clearly entitled to recover them. *La. Code, art.* 2482.

12. The defendant cannot avail himself of prescription. He purchased the evicted premises in March, 1816, was called in warranty, and appeared in 1825, *less* than ten years. The day of the seizure was the 20th December, 1824. *Civil Code, art.* 81, *page* 473.

13. The action of warranty now instituted, is not prescribed. The right to this action only dates back to 1826, the time when the heirs of Babin were evicted, and not from the time of the sale by the defendant to them, in 1816. Again under the old Civil Code, actions of warranty, with many others, were only prescribed by thirty years. *Civil Code, art.* 65, *page* 487.

Roselius, for the defendant.

1. This is an action of warranty. The defendant was not called to defend the hypothecary action by which his vendee was evicted. If he can show that he could have defeated

that action, had he been called, he must succeed against the plaintiff in the present case. *Civil Code, page* 356, *art.* 64.

2. The defendant could have successfully resisted the hypothecary action: *first*, because the act of sale from Doublin's heirs to Hernandez, on which the order of seizure and sale was obtained, contains no mortgage; *second*, because the note sued on is not identified with the act of sale, nor was, or is it now shown that it was given for the property sold to Hernandez; *third*, there is no final judgment against Hernandez, the principal debtor. The judgment by default in the record is not signed. *Civil Code, page* 460 *art.* 48: *fourth*, it is null and void, both as to form and substance; it does not appear to be a judgment by default confirmed; it contains no reasons, and it does not appear to be rendered in term time; *fifth*, prescription could have been successfully opposed, as more than ten years had elapsed from the sale to Hernandez, in 1813, until the institution of the hypothecary action in 1824. 2 *Martin's Dig.* 194, 304. *Civil Code, page* 472, *art.* 81.

3. The defendant is protected by prescription in this case, as more than ten years elapsed from the sale to Babin, until the institution of this suit, in 1830. *Paillet, page* 851, *note to art.* 2252 *of Code Nap. Merlin, Question du Droit, verbo Prescription, sec.* 14.

3. The damages claimed for improvements are not proved. The defendant sold the premises to Babin, for two thousand five hundred dollars, and seven years afterwards, they were sold by the sheriff on a year's credit, with all the pretended improvements for the same sum.

4. The defendant contends, that if he had been called in warranty when the premises were seized, he could have showed the mortgage, under which Doublin's heirs proceeded, was null and void. The *procès verbal* of the sale of Doublin's estate, in which this mortgage is alleged to be retained, cannot have the effect, and be evidence of a conventional mortgage. A conventional mortgage can only exist by an authentic act, or act under private signature, &c., and there is no other

conventional mortgage except that which is expressly granted in writing made between the parties. *C. Code, art. 5, page* 452.

5. The judgment which Doublin's heirs obtained against their debtor, before proceeding on the mortgage against the third possessor, was null; being given without reasons, and not signed by the judge. This was requisite under the former system, as well as now. As the law now stands, there cannot be a doubt, that judgment by default must not only be signed, but must also contain the reasons on which it was rendered. *Code of Practice, art.* 315.

6. The warrantor cannot be required to reimburse the purchaser the value of his improvements, when he is not called in warranty. It is clear, that if a proper defence had been made to the hypothecary action, the improvements would have been allowed out of the proceeds of the sale of the evicted premises. If Babin's heirs had chose to abandon the property without seizure, they would then have been entitled to demand of the person evicting them their improvements. 6 *La. Reports,* 739.

7. The plaintiffs have omitted to credit themselves for one thousand dollars, being the difference between the mortgaged debt and the price the property sold for. The debt was one thousand five hundred dollars, and price two thousand five hundred dollars. If the defendant is not entitled to a credit for this difference, he is certainly entitled to a credit for a part of it.

8. The defendant having shown the insufficiency of the judgment and mortgage in the hypothecary action, by which the plaintiffs were evicted, and which he could have shown, had he been properly called in warranty in that case, must now be forever discharged.

Mathews, J., delivered the opinion of the court.

This suit was instituted in the court below, by the plaintiffs, as heirs of Charles Babin, against the defendant, the seller and warrantor of a certain tract of land, described in the petition, to their ancestor. The object of the suit, is to recover from the warrantor damages, on account of eviction,

from the property which was sold by him, in consequence of an hypothecary action, prosecuted against the vendor, based on a special mortgage, which had been retained in a sale made at auction, by the judge of the parish of Ascension, &c., at the instance of the heirs of a certain Nicholas Doublin, of whose succession this land made a part.

The sale made by the defendant in the present action, contains a clause of general warranty, and it is not pretended that he is not bound to make good the loss and damages suffered by the plaintiffs, in consequence of the alleged eviction, unless it be shown that they suffered themselves to be evicted without calling the vendor in warranty, and that he could have successfully resisted the claim of the plaintiffs, in the hypothecary action, by just and legal means of defence, subject to his power and control. In truth, these are the grounds of defence laid in his answer. Judgment was, however, rendered in the court below against him, from which he appealed.

Admitting the fact to be true, that the defendant in the present suit was not regularly called to warrant the title by him conveyed to the ancestor of the plaintiffs, in the hypothecary action, by which they were evicted, we are now compelled to consider the force and effect of the means of defence assumed, as if they had been pleaded in that action, *Civil Code, page* 356, *art.* 64. These are as specified and detailed by the counsel for the appellant, as follows: 1st. The act of sale from Doublin's heirs, on which the order of seizure and sale was granted, contains no mortgage. 2d. The note sued on, was not identified with the act of sale, &c. 3d. There is no final judgment against the principal debtor, &c. 4th. That offered in evidence in the present case, is without signature, without confirmation (being a judgment by default), and without reasons, therefore, utterly null and void. 5th. Prescription could have been successfully pleaded, &c.

The validity of these assumed grounds of defence must be tested by the law and facts of the case.

Let us examine them in the order placed by the appellant:

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The *procès verbal* of a sale, in which a mortgage is retained, made by the parish judge acting as auctioneer, and duly recorded in the parish judge's office, is full evidence of the mortgage, which is binding on third possessors of the mortgaged property.

The identification of the note sued on with a mortgage taken to secure its payment, may be shown by circumstantial and parole evidence, without the paraph *ne varietur*.

1. The evidence of the mortgage reserved by the heirs of Doublin, in the sale made by them at auction, appears by the *procès verbal* of the auctioneer, who exercised this function *ex officio*, as being parish judge, and is exhibited in this suit, purporting to be a copy from the records in his office as judge; appearing in this manner, it is evidence equally good, of the mortgage retained as of the sale, and if it transferred the property to the vendee (which is not denied), the transfer was made subject to the terms created by the hypothecation, and all being recorded in the office of the judge, the mortgage is binding on third possessors.

2. As to the identification of the note sued on, with the mortgage, admitting this to be absolutely necessary in all actions on mortgages, it is not required that this circumstance, which is merely accidental to the contract, should be made appear by the usual paraph, *ne varietur*. In the present case, a comparison of the date of the note with the sale, and the circumstance appearing that it was executed precisely in pursuance of the terms and conditions of the sale, both as to persons and time of payment, create a violent presumption in favor of its identity with the mortgage, which must stand until the contrary be proven, which has not been done in the present instance.

In relation to the third and fourth grounds of defence (for we will consider them together) it is true, that under the old Code, which governed when the proceedings took place, in the hypothecary action, to which the present contest refers, a creditor was bound, before seizing mortgaged property in the hands of a third possessor, to obtain a judgment against his debtor. And if it be true, as alleged, that no judgment was obtained in the instance now before the court, against the original debtor, the action of mortgage, properly so called, against the third possessor, might have been successfully opposed on this ground. But a judgment was obtained, and the question to be solved relates to its validity.

According to the rules of practice in force in 1816, which was before the adoption of the Code of Practice, a judgment by default became final, *ipso facto*, by the lapse of *three days;* and reasons are not necessary to the validity of such a judgment.

It is a judgment by default, and under the rules of practice, which were in force at the time it was entered, it became final, *ipso facto*, by the lapse of three days. We have, heretofore,

decided, that reasons are not necessary to the validity of such a judgment. 4 *Martin*, 665. 7 *Ibid.* 440.

The question now occurs, whether a judgment, which becomes final by lapse of time, ought to be considered as available in favor of a mortgage creditor, in a pursuit for payment of his debt, against a third possessor, when such judgment has not been signed by the judge, in whose court it may have been entered by default. It has been decided in several cases, that judgments rendered and pronounced by the tribunals of the state, are not complete, in all respects, until they are actually signed by the judges, who may have pronounced them. Until they are sanctioned by the signature of the judge, a new trial may be rightfully claimed in the court of the first instance, and an appeal taken to the Supreme Court, within the delays limited, counting from the day of actual signature. 3 *Martin*, 389, and 5 *Ibid. N. S.* 105. *Ibid.* 320. The judgments in these cases, it is believed, were pronounced by the judges, who presided at the hearings of the causes and after *contestationes litium*. We are not aware that subsequent legislation has introduced any radical change in the principles established by the act of the legislative council, of the late territorial government of this country, regulating the practice of the superior court of the territory of Orleans, touching judgments taken by default, and requiring the signature of the judge who renders a judgment; at least no change which can operate on the present question. By the fourth section of that act, it is provided, that "if a defendant shall not appear on the day given in the citation, and file his answer, &c., then the petitioner or his counsel, may order judgment to be entered up against such defendant, and if they shall hold session three days after taking such judgment, and no motion is made to set the same aside, upon showing good cause, and to file an answer, or if such motion be made and overruled, then the said judgment shall be final, &c." In all this proceeding, no direct agency of the court is required, and the judgment becomes final by the operation of the law, and it would follow as a corollary, that such a judgment does not require the signature of the judge, in order to

A judgment by default, which becomes final by operation of law, does not require the signature of the judge to render it perfect and final.

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render it perfect and final. But the 13th section of the same act requires, "that all judgments rendered by said court, shall be pronounced in open court, be entered on the minutes of the court by the clerk, and shall, three days thereafter, if not set aside by the court, on motion for a new trial, be signed by the presiding judge of the court." This section, by its terms, most clearly relates to judgments, *rendered and pronounced by the court* after trial, and can only, on a forced construction, be made applicable to judgments by default, which become complete and final, by mere operation of law. According to this interpretation, the signature of the judge, to a judgment of the latter kind, is no more requisite to its validity, than that reasons should be adduced in support of it, and it has already been decided by this court, that reasons need not be assigned in a judgment which becomes final by lapse of time and operation of law, on one taken by default.

In an action of warranty, prescription only runs from the date of eviction. If the action is commenced within ten years, it is in time to prevent prescription.

The action of mortgage is not barred by prescription when commenced within ten years from the time when the debt became due and payable.

Thus we are brought to the plea of prescription. It is clear, that it is not available as a defence to the present action, as introduced in the points of the appellee. The suit in warranty was commenced in 1830, and the eviction complained of did not take place until 1826. Neither could it have been effectually opposed to the mortgage creditors, in their action of mortgage; for their right to sue did not accrue until 1815, and they commenced the hypothecary action, properly so called, in 1824; so that only nine years had elapsed between the time when they had a right to commence it and the time when they did commence that proceeding.

The third possessor, who is evicted, is entitled to recover of his vendor and warrantor the value of his improvements put on the evicted premises at the period of eviction.

The last objection to the justice and legality of the judgment rendered in the court below, has reference to the damages allowed to the plaintiffs. It is said that they are not authorised, either by the facts or law of the case. As to the matter of fact, it suffices to observe, that there is evidence on record, proving that the third possessor, who was evicted, had made improvements on the premises to the value of one thousand dollars at least, and this amount only is awarded. As to the law on this subject, it appears by the art. 2485 of the *La. Code*, that the seller or warrantor is bound to reim-

burse, or to cause to be reimbursed to the purchaser, by the person who evicts him, all useful improvements made by him on the premises. This article is in accordance with the provisions of the old Civil Code, and conforms to the doctrine taught on this subject, by Pothier, in his treatise on sales. *Contrat de Vente, nos.* 132 *and sequentes.* In case of eviction, consequent on a mortgage, it is possible, that these rules may not strictly apply. In the present case, however, nothing appears to show any injustice in their application.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

DAVIS *vs.* LEEDS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

In cases submitted to referees, without granting them the power to act as amicable compounders, the court may revise and rectify any errors contained in the award rendered by them.

Where a cause is submitted to referees, with power to act as amicable compounders, their award rendered in pursuance of the submission, and made in relation to the matters actually referred to them, is without amendment, revision or appeal.

The award of amicable compounders, which has no relation to the matters in dispute submitted to them, is absolutely null and void; and when their acts show dishonesty, gross misconduct, want of due regard to well settled principles, or extreme partiality in rendering their award, these will be good grounds for *setting it aside.*

Amicable compounders are not required to determine, according to strictness of law, but are authorised to abate something of this strictness, in favor of natural equity.

The approval and formalities required, in the homologation of an award, are only intended to make it executory, and not for the purpose of an examination on its merits.

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The law, providing for submitting causes to amicable compounders, whose award, if not impeached, is not subject to revision by the courts, is not unconstitutional.

This is an action for the rescission of a contract with the defendant, to furnish the plaintiff a steam engine and sugar and corn mill, for six thousand dollars, and for the restitution of the price, with damages.

The plaintiff alleges, he is a sugar planter, and contracted with the defendant, who owned an iron foundery, to furnish and erect for him, a steam engine, sugar and corn mill, on his plantation, for doing which, he conveyed a house and lot to the defendant, at the price of six thousand dollars; and that the defendant bound himself to put up said engine, mills, and all the necessary machinery, in the best workmanlike manner, by the first of August, 1832, in time to take off his sugar crop. He further alleges, the defendant failed to comply with his contract, and did not put up the steam-engine and sugar mill, until the 29th November, when the grinding season was nearly over, and then in such an imperfect manner, and of such bad materials, as rendered them almost unfit for use, and failed entirely to put up the corn-mill, in consequence of which he has sustained damages to the amount of eight thousand dollars. He prays for a rescission of the contract, and sale of the house and lot to the defendant, and for the restitution of the price, (six thousand dollars,) with eight thousand dollars in damages.

The defendant admitted the contract, and pleaded a general denial to all the other allegations; and also averred, that any delay in putting up the engine and mill, was occasioned by the plaintiff, and that it was with his consent the corn-mill was not furnished.

After the cause was at issue, on motion of the counsel for each party, and each naming a suitable person, with a third as umpire, it was ordered by the court, that said persons be appointed referees, arbitrators and *amicable compounders*, and as such, to settle and decide upon the matters in dispute between the parties.

The amicable compounders, or a majority of them, after hearing all the evidence adduced, and the explanations of the parties respectively, made up their award, in which they decided, that the contract be cancelled, and that the plaintiff recover six thousand dollars, the price of the engine and mills, with interest from judicial demand, and five thousand dollars damages and costs; and that the engine and mill remain subject to the order of the defendant.

The defendant's counsel filed an opposition to the homologation of the award, mainly on the grounds of error and want of precision in stating the accounts, allowing damages when none were proved, of excessive damages, the award being contrary to law and evidence, and that the arbitrators exceeded their powers. He prays leave to appeal from the award, and that it be set aside as being informal, illegal, unjust and oppressive.

The district judge was of opinion, that in a case of a submission to amicable compounders, the award is not open to examination on the merits. *Code of Practice, art.* 460. But an award is open to examination by way of cassation, as where a *specific* charge of misconduct, exceeding of powers, &c., is brought against the amicable compounders.

The award was homologated, and made the judgment of the court. The defendant appealed.

Preston, for the plaintiff.

1. In pursuance of the article 444, of the Code of Practice, both parties agreed that their dispute might be submitted to the decision of judicial arbitrators, to act as amicable compounders.

2. The amicable compounders were duly qualified, and a majority made an award. The District Court could not do otherwise than homologate it, and make the award the judgment of the court, for the law requires that it must be homologated as it stands, to have the effect of a definitive judgment. *Code of Practice, art.* 460.

3. The parties clearly constituted the arbitrators amicable compounders; and nearly all the grounds of opposition to the

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award, would require the court to open and revise it, on its merits, which is prohibited by the *Code of Practice.*

4. The award of ordinary arbitrators, could not be set aside on any of the grounds set up in the opposition. A bill in equity will not lie, to set aside an award of arbitrators on a question of fact, except for corruption, or irregularity of conduct in the arbitrators. 2 *Jacobs and Walker's Reports*, 249, 259. *La. Code*, 3077. 1 *Swan*, 52, 55. 6 *Vesey*, 282, 358. 4 *Brown's Chancery Cases*, 536. 1 *Vesey, jr.* 369. 2 *Ibid.* 15. *Kyd on Awards*, 332.

5. It is impossible to show, that the amicable compounders exceeded their authority or powers. Their award comes within the pleadings, and, no doubt, they made a compromise between rigid right and a hard case, as arbitrators always do. The award should be favored, as this mode of terminating differences, is favored in law and equity, and by general consent of the community.

6. The articles of the Code of Practice, authorising appeals from awards, are inapplicable to this case. They can only apply to arbitrations, made by the parties out of court, from which an appeal may be taken to the District, and from thence to the Supreme Court. *La Code, art.* 3097.

7. The constitution, art. 6, sec. 6, requires the legislature "to pass such laws as may be necessary and proper, to decide differences by arbitrators, to be appointed," &c.

8. If the party was permitted to appeal, and try the case *de novo*, and introduce witnesses and new testimony, the case would not be decided by arbitrators, but by the court.

Carlton and Lockett, for the defendant, contended, that the awards of arbitrators were open to an examination and revision by the courts. An award had been set aside in this court, because it was not written in the French language. This decision gave rise to an act of the legislature, in relation to awards, which permits them to be excepted to, for informalities and defects, and especially when the arbitrators exceed their powers, or are not qualified, &c. 9 *Martin*, 200. 1 *Moreau's Digest*, 458-9-60.

2. The arbitrators must make their report with precision, by stating the accounts, to enable the court to judge of its correctness, and to decide summarily on the merits of the award. *Code of Practice*, 455.

3. The legislature cannot pass a law, which deprives a party of his right of appeal. That is in effect done in this case, if the court is not permitted to examine the award on its merits, and revise it on appeal. Such a law is unconstitutional.

4. The appellate jurisdiction of this court, applies to the facts as well as the law of a cause, consequently we have a right to be heard on the facts, and the court has the power to examine them, and revise the decision or award which is based on the facts submitted and in evidence.

5. If the amicable compounders had given more damages than the party claims in his petition, they would certainly have exceeded their powers, and the award would be set aside; and why not the same result take place, if they give damages when none are proved, or more than are proved?

Mathews, J., delivered the opinion of the court.

In this case, the plaintiff claims restitution of the price, which he had paid to the defendant, (who is an iron founder in the city of New-Orleans,) for a steam-engine, sugar-mill and corn-mill, which were by contract to have been furnished by the latter, constructed in a manner suitable to carry into effect the purposes for which they were intended. The petition contains allegations of unjustifiable delays, in making the engine and sugar-mill; of defects in their construction, so great as to render them wholly unfit for the uses, in which they were to be employed, and of a total neglect to make the corn-mill, &c., and concludes by praying, that the contract should be rescinded, the price refunded, and that damages should be adjudged to the plaintiff, in reparation of losses sustained by him, arising from an impossibility to take off his crops of sugar, &c.

The answer contains a full denial and allegation that the delays complained of, were owing to the fault or assent of the plaintiff.

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On these pleadings the case was submitted, by consent of parties and under a rule of court, to certain arbitrators, chosen by the parties themselves, each of them choosing one, and pointing out by name an umpire, in the event of disagreement, &c. The powers and authority of arbitrators, known in our jurisprudence, under the denomination of amicable compounders, were by the submission, confined on the persons thus chosen as judges, by the parties litigant. They made, and returned their award into court in due time, which, after cause shown on a rule taken for that purpose against the defendant, was homologated by the court below, and made the judgment thereof, from which he appealed.

This award condemned the defendant to refund the price stipulated and paid for the engine and mills, viz: six thousand dollars, and also assessed damages against him to the amount of five thousand dollars.

The correctness of the decision of the court below, depends mainly on a proper interpretation of certain articles of the Code of Practice, found in the section which treats of experts, auditors of accounts, and judicial arbitrators.

In cases submitted to referees without granting them the power to act as amicable compounders, the court may revise and rectify any errors contained in the award rendered by them.

The grounds of opposition, to the homologation of the award, in the present instance, are most of them, (if not all,) such as are usually opposed to awards rendered under ordinary submissions to arbitrators. In cases, submitted without the grant of power to the referees, to act as amicable compounders, the court may rectify the errors contained in awards, by them rendered. *Code of Practice, art.* 459.: "But if, from the submission entered into by the parties, it appears that they intended to give to the arbitrators power to act as amicable compounders, the court cannot revise the award. It must be homologated as it stands, in order that it may have the effect of a definitive judgment." *Code of Practice, art.* 460.

Where a cause is submitted to referees with power to act as amicable compounders, their award rendered in pursuance of the submission, and made in relation to the matters actually referred to them, is without amendment, revision or appeal.

The submission in the present case, clearly contains a grant of power to the arbitrators, to act as amicable compounders, and consequently deprives the tribunals of the country, of all authority to revise the award rendered in pursuance of it. Whatever has been done, in relation to the

matters actually referred to their decision, if done honestly, must remain without the possibility of revision, and as a necessary consequence, without alteration or amendment. Acts done by such arbitrators, having no just relation to the matters in dispute submitted, would be absolutely void, and gross misconduct on their part, exhibiting a want of due respect, to common and well established rules, in regard to right and wrong, or extreme partiality in their award, would be good causes for setting it aside entirely, if proven to the court, on opposition to its homologation. But nothing of this kind is either alleged or proven, in the present instance. The whole of the grounds assumed, in the numerous points presented by the counsel of the defendant, relate to want of precision in the manner in which the cause was laid before the arbitrators, and errors in their award, arising from a mistaken view of the facts and the law of the case. If parties will submit their disputes to be decided by men, chosen by themselves as judges, under the appellation of amicable compounders, they must abide their judgments, without hopes of having them revised by the courts of justice established by the constitution and laws of the state. Such judges are not required to determine according to the strictness of the law. They are authorised to abate something of this strictness in favor of natural equity. *La. Code, art.* 3077.

The award of amicable compounders which has no relation to the matters in dispute submitted to them, is absolutely null and void; and when their acts show dishonesty, gross misconduct, want of due regard to well settled principles, or extreme partiality in rendering their award, these will be good grounds for *setting it aside.*

Amicable compounders are not required to determine according to strictness of law, but are authorised to abate something of this strictness in favor of natural equity.

This article of the Code, if it stood alone in our jurisprudence, would appear extremely vague and indefinite. What might be considered a strict pursuance of law in the administration of justice, and what a loose adherence to its rules, are questions that would depend ultimately for their solution, on the decisions of courts in the last resort. But it appears to us, that a clue to its interpretation, (not indeed very evident,) is given in the articles of the Code of Practice above cited, wherein it is declared, that the awards of arbitrators, acting as amicable compounders, cannot be revised by the courts. In article 3096, of the Louisiana Code, provisions, similar to those contained in the Code of Practice, are found in relation to the awards of arbitrators indiscriminately, wherein it is declared, that "an award, in order to be put in execution,

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ought to be approved by the judge; but this formality is only intended to invest the award with a sufficient authority to ensure its execution, and not to submit to the judge the examination of its merits, except in case an appeal is brought before him." This article, so far as it relates to an appeal, as well as the one immediately following, appear to us to be totally inadequate to carry into effect their apparent purposes, without the aid of ulterior legislation. If the appeal spoken of, be intended as one directly to the Supreme Court, no means are given by which the case may be brought up; and if the intention was to give an appeal, in the first instance, to the inferior tribunals, and in that way to bring a cause, involving more than three hundred dollars, before the Supreme Court, the same want of means renders it impossible, as the formalities requisite to effect such a purpose are not pointed out.

The approval and formalities required in the homologation of an award are only intended to make it executory, and not for the purpose of an examination on its merits.

The law providing for submitting causes to amicable compounders whose award, if not impeached, is not subject to revision by the courts, is not unconstitutional.

In the course of argument, one of the counsellors for the appellant, dwelt much on the unconstitutionality of any act of legislation which would operate in such a manner as to deprive a suitor of the right of appeal, or the right to have his cause revised by the appellate court, established by the constitution, a law which should undertake absolutely to deny the right of appeal, (in any case where the matter in dispute is more than three hundred dollars,) from a final judgment, rendered by a court of inferior jurisdiction, established by law, would be clearly unconstitutional. But many of the provisons of legislative acts, relating to the manner of taking and bringing up appeals, have in their operation the effect of depriving an appellant of the means of having his case revised in the Supreme Court, on its merits; and these laws have never been deemed unconstitutional. Suppose the legislature had provided no means for obtaining and bringing appeals before the appellate court, as established by the constitution, its provisions on this subject, would probably have remained a dead letter, and the supreme tribunal of the state must have continued inoperative. In giving life and activity to this court, the acts passed by the legislature, pointing out the mode in which the judgments of inferior

courts may be revised and affirmed, or revised and annulled, and which in their operation do, sometimes, by the neglect of an appellant, preclude the Supreme Court from examining a cause on its merits, are certainly not contrary to the constitution. The constitutional provision which gives the right of appeal, had reference alone to inferior courts, to be established for general purposes by the legislature; and if parties to a suit will choose their own judges, under the sole authority of law, they must be bound by the decision of such judges, in conformity with the provisions of law.

According to the best consideration we have been able to give to the case, we are of opinion, that the judgment of the District Court is correct.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

BARBARIN *vs.* DANIELS.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

When the original payee is in possession of a note, on which his name is endorsed in blank, no proof of re-transfer is necessary to enable the holder to recover.

A mortgage which, without reciting the interest, refers to and secures the payment of a note, is evidence of the principal obligation, and covers all the stipulated interest therein.

Where a note stipulated for ten per cent. per annum interest, and was made payable eighty-five days after date: Held, that the interest run from the date of the note, until payment, without any demand at its maturity.

The Supreme Court, in its discretion, will refuse damages, as for a frivolous appeal, even when the grounds of defence are untenable, and when the principles upon which they rest, have been settled by previous adjudication.

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The plaintiff obtained an order of seizure and sale, on the following note, secured by a mortgage on a house and lot, in the city of New-Orleans.

"$2,700." "New-Orleans, April, 16, 1834."

"Eighty-five days after date, I promise to pay to the order of Morris Jacobs, two thousand seven hundred dollars with interest, at the rate of ten per cent.; value received."

"Aaron Daniels."

Endorsed, "Morris Jacobs, J. Barbarin."

Paraphed, "*Ne varietur*, 23d April, 1834."

"Carlisle Pollock, N. P."

When the note became due, it was deposited in bank for collection, and protested at the instance of the cashier, as holder, and sued on by the plaintiff, without any re-transfer.

The mortgage simply recites the note sued on, by its date and amount, without any mention of the interest stipulated on its face. The defendant took an appeal from the order of seizure and sale.

D. Seghers, for the appellant and defendant.

1. The plaintiff sues on a note of two thousand seven hundred dollars, which he alleges, *necessarily imports confession of judgment.* Now it appears from the note, that it was transferred by his signature endorsed thereon; and from the instrument of protest, it appears that the bank of Louisiana is the holder of the note, and consequently the only party entitled to sue on the same.

2. The judge *a quo*, therefore, erred in granting the order of seizure and sale, at the suit of the plaintiff, Joseph Barbarin, while from his own showing, it appears that he had parted with the note.

3. The order of seizure and sale is granted, "*for the payment and satisfaction of the above sum of two thousand seven hundred dollars, together with the maximum of legal interest and costs,*" agreeably to the conclusions of the petition. Now it is on the notarial act, not on the note, that the order of seizure and sale can issue. Besides, even if the note should be considered as sufficient evidence of such a stipulation of interest,

this stipulation cannot be extended beyond its own limitation: that is to say, that by the wording of this contract or promise, the time during which the interest of ten per cent. per annum is to be paid, is confined to the eighty-five days which the note had to run.

4. The judge *a quo*, therefore, erred: 1st. In granting the order of seizure and sale for the payment of conventional interest, not secured by the mortgage recited in the notarial acts on which the said order is founded, and not even mentioned in those acts; and 2d. In not restraining the rate of interest at ten per cent. per annum to the space of time during which it was promised to be paid.

Keene, contra.

Bullard, J., delivered the opinion of the court.

The appellant assigns for errors apparent on the face of the record, 1st. That it appears by the note itself that it had been transferred by the endorsement of the appellee, and that the Bank of Louisiana was the holder at the time of the protest; and, 2d. In granting the order of seizure for the payment of conventional interest, not secured by the mortgage recited in the notarial acts on which said order is founded; or, at all events, in not restraining the interest to the space of time during which it was promised to be paid.

When the original payee is in possession of a note on which his name is endorsed in blank, no proof of re-transfer is necessary to enable the holder to recover.

I. The endorsement is in blank, and the original payee is in possession of the note. It is true, the protest states, that the cashier of the Bank of Louisiana was at that time holder for the bank. But this court has decided, in several cases, that when the payee retains possession, and the endorsement of his own name on the note is in blank, no proof of re-transfer is necessary to enable the holder to recover. 7 *Martin, N. S.* 255. 2 *La. Reports*, 193.

A mortgage which, without reciting the interest, refers to and secures the payment of a note, is evidence of the principal obligation, and covers all the stipulated interest therein.

II. The note referred to in the act of mortgage, and identified with it by the certificate of the notary, stipulates for an interest at the rate of ten per cent. per annum, and is made payable eighty-five days after date. The mortgage, without reciting the interest, refers to and secures the payment of the

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BARBARIN vs. DANIELS.

Where a note stipulated for ten per cent. per annum interest, and was made payable eighty-five days after date: *Held*, that the interest run from the date of the note until payment, without any demand at its maturity.

The Supreme Court, in its discretion, will refuse damages as for a frivolous appeal, even when the grounds of defence are untenable, and when the principles upon which they rest, have been settled by previous adjudications.

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note, which is evidence of the principal obligation. The mortgage, therefore, covers the stipulated interest. But it is contended, that the interest is not to run after the maturity of the note, and that the judge erred in issuing the order of seizure for interest, until final payment. We think the judge did not err. Article 1931 of the Louisiana Code, provides, that "in contracts stipulating a conventional interest, it is due, without any demand, from the time stipulated for its commencement until the principal is paid."

The appellee in his answer, prays for damages of ten per cent. as for a frivolous appeal. The grounds upon which the appellant seeks relief in this court are, in our opinion, untenable; that which relates to the endorsement having been adjudicated upon by this court, in several cases, and, as relates to interest until final payment, the principle is settled in the most unequivocal manner by the article of the Code above referred to. But we do not consider this one of the cases which require us to inflict a severe penalty on the appellant.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

PETIT ET ALS. *vs.* DRANE.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

The service of citation of appeal, on the attorney at law of the appellees, when it is admitted the latter are residents of the parish where suit is brought, is illegal, and the appeal will be dismissed.

This suit is brought by the plaintiffs to recover the sum of nine hundred and four dollars and forty cents, for work and labor done, and materials furnished, at the instance and request of the defendant, according to an account annexed.

The defendant avers, that he employed the plaintiffs, while acting in his capacity of assistant quarter-master and agent of the United States army, and with the full knowledge of the plaintiffs that he did so act; that the United States alone are liable for any just amount which may appear to be due. He excepts to the plaintiffs' right to sue him in his individual capacity, and that the action cannot be maintained. In answering to the merits, he denies that the plaintiffs done the work, or that it was worth the price charged; and sets up payments, made in his official capacity, to the persons who done the work, as offsets to the demand against him.

There was judgment rendered in favor of the plaintiffs, and the defendant appealed.

The appeal was made returnable to the Supreme Court, the first Monday of November, 1834. The sheriff returned, that he had served the petition and citation of appeal on the appellees, by handing the same to their attorney at law.

Benjamin, for the plaintiffs and appellees, took a rule on the appellant, to show cause why the appeal should not be dismissed, for illegal service of the petition and citation of appeal.

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2. He showed by his affidavit, that the appellees were residents of the parish where the suit was instituted, and had a known domicil therein, which he would have pointed out to the officer, had application been made to him.

Lockett, contra, contended, that the plaintiffs had no known place of residence, at which they could be found, or domicil, at which to leave the citation. In such cases, and when it is not known that they reside out of the state, the party is without a remedy. The law makes no provision for it. The party should, therefore, have the right to make a new service, when the domicil or residence of the appellees is found.

2. It is now admitted, in this case, that the service of citation of appeal is not good. We ask the court for time to make it good, by a new citation and service. When the errors and omissions in making service are not the fault of the appellant, time will be given, if applied for, before or at the time of hearing the cause. *Code of Practice, article* 898.

Bullard, J., delivered the opinion of the court.

The service of citation of appeal, on the attorney at law of the appellees, when it is admitted the latter are residents of the parish where suit is brought, is illegal and the appeal will be dismissed.

The appellee urges the dismissal of the appeal, in this case, on the ground that there has been no due service of citation of appeal. The service was made on the attorney at law, although it is admitted that the appellees are residents of New-Orleans. Article 582 of the Code of Practice, requires the sheriff to serve the petition and citation on the appellee, if he reside within the state, or his advocate, if he do not, either personally, or by leaving them at their place of usual domicil.

It is, therefore, ordered, that the appeal be dismissed at the costs of the appellant.

LOZE *vs.* DIMITRY ET ALS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The seizure under writ of *fieri facias*, of a schooner or other moveable property of the husband, takes it from his possession, so that a subsequent judgment against him by his wife, with her legal mortgage, cannot affect it.

Among the different privileges and mortgages, which may exist on ships and other vessels, none is given to the wife.

Ships and vessels are subject to hypothecation, though not like immoveables and slaves; but only according to the laws and usages of commerce.

The legal mortgage of the wife does not attach to ships and vessels, as the hypothecation is not effected according to the laws and usages of commerce.

This case grew out of a conflict of claims between the plaintiff, who had seized two schooners under a judgment and execution against the defendant Dimitry, and his wife, who claims a privilege on said vessels.

The plaintiff obtained judgment against Dimitry, and in virtue thereof seized two schooners belonging to the defendant, on the 30th January, 1834. The defendant's wife obtained judgment of separation of property, on the 17th February following, for a large amount of dotal and paraphernal property, with legal mortgage on her husband's estate. She intervened in the seizure, and opposed it on the ground that she had a higher privilege and mortgage, and prayed that the property be sold to satisfy her claim.

The district judge was of opinion, that when the wife obtains a judgment for the restitution of her paraphernal and dotal property, her mortgage being a latent one, attaches to all the property of the husband; that the schooners, though under seizure, were still his property until sold, and were liable to her mortgage. Judgment was rendered for the intervenor. The plaintiff appealed.

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Grailhe, for the plaintiff, insisted that, by the seizure, the seizing creditor obtained a privilege on the vessels, which could not be opposed by the claim of the intervenor, whose judgment was rendered afterwards. *Code of Prac. art.* 722.

Canon, for the intervenor and appellee, contended that the wife's privilege or mortgage, was of a higher class than that of the seizing creditor, and her mortgage extended to all the husband's property. *Code of Practice*, 396.

Martin, J., delivered the opinion of the court.

The plaintiff is appellant from a judgment, which decrees to the wife of the defendant (she being an intervening party), the proceeds of two schooners, seized by the plaintiff, under an execution issued in pursuance of a judgment obtained against said defendant, on the 30th January, 1834, while the judgment by which the intervening party obtained a separation of property and liquidation of her claim, was not rendered until the 17th of February following, and that too, after the seizure of the schooner, under his (the plaintiff's) writ of *fieri facias*, which put an end to the defendant's possession of these vessels.

The counsel for the appellant contends, that the seizure under the Code of Practice, article 720, vested in the plaintiff a privilege on the property seized, which entitled him to a preference over all other creditors.

On behalf of the intervening party, it is urged that the privilege claimed, under the article of the Code of Practice cited, is only a privilege over other common creditors, which does not stand in the way of higher privileges, when asserted in due time. We are referred to the Code of Practice, article 396, where the mode in which those who have a higher privilege than the seizing creditor may assert it; that the wife has a tacit mortgage on all her husband's property, susceptible of being mortgaged, amongst which ships and vessels are expressly classed. *La. Code*, 3256, *No.* 4.

It appears to us, that the schooners having been levied on, under the writ of *fieri facias*, were taken out of the possession of the defendant; and his wife, therefore, could not acquire a privilege on them, by a judgment posterior to the seizure of moveable property. *La. Code, art.* 3182.

The *Louisiana Code, article* 2304, *et seq.* recites the different privileges which may exist on ships and vessels; among those, none is given to the wife.

Ships and vessels are indeed susceptible of being mortgaged, but not like immoveable property. The mortgage of ships and vessels (or, to speak more correctly, in the language of the Louisiana Code, art. 3272), the *hypothecation* of ships and vessels does not take place, like that of immoveable property and slaves, but according to the laws and usages of commerce. They are not mentioned in that part of the Louisiana Code which treats of legal and judicial mortgages, and not classed with immovable property and slaves, as being susceptible of mortgage.

From this view of the case, the District Court erred, in sustaining the claim of the intervening party. In our opinion, she had no privilege, because the schooners, by the seizure under the plaintiff's execution, were taken out of the possession of the husband, the wife's debtor, before the dissolution of the marriage partnership. She had no mortgage thereon, as the hypothecation or mortgage on them as ships and vessels had not been made or executed according to the laws and usages of commerce.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and that the claim of the wife and intervening party be dismissed, with costs in both courts.

The seizure under a writ of *fieri facias* of a schooner or other moveable property of the husband, takes it from his possession; so that a subsequent judgment against him by his wife, with her legal mortgage cannot affect it.

Among the different privileges and mortgages which may exist on ships and other vessels, none is given to the wife.

Ships and vessels are subject to hypothecation, though not like immoveables and slaves; but only according to the laws and usages of commerce.

The legal mortgage of the wife does not attach to ships and vessels, as the hypothecation is not effected according to the laws and usages of commerce.

MALCOLM & WOOD *vs.* SCHOONER HENRIETTA ET ALS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The provision in the Louisiana Code, that "ships and other vessels" are susceptible of being mortgaged, is restricted to hypothecations, made according to the laws and usages of commerce. In whatever cases those usages and laws would recognise the validity of an hypothecation of a vessel, our Code also recognises it, *and in none other.*

So where a conventional mortgage on a schooner, executed by the owner, in favor of a creditor, to secure the payment of a debt, and duly recorded in the mortgage office, was sought to be enforced: *Held*, that such a mortgage has no effect; and that ships are not subject to the same incumbrances which attach to immoveables, as lands and slaves, situated within the constant operation of the laws of the state.

This is an action against the owner and schooner Henrietta, for supplies furnished, amounting to six hundred and ninety-nine dollars and fifty cents, in which the plaintiffs claim judgment with a privilege on said vessel, and pray that she may be provisionally seized, and held subject to their demand.

Holston intervened, and set up a demand against the said schooner and her owner, for the sum of five hundred and forty-two dollars, secured by a special mortgage, duly recorded in the mortgage office, and claims to be paid in preference of all other creditors. He denies that the plaintiffs have any privilege, and that if they ever had one, it is extinguished by the departure of the vessel since their claim attached.

Gedney also intervened, and claimed four hundred and twenty dollars and seventy-seven cents, for work done and materials furnished, as a ship carpenter on said schooner, and claimed to be paid, as a privileged creditor, in preference of all others.

Several sailors put in privileged claims.

The district judge fixed a day to hear and try the several claims against the schooner and her owner, and to class them according to their privileges; and after hearing the parties and examining their several pretensions, proceeded to give judgment in the following manner: "*Miller and Living*, who are sailors, are entitled to be paid their wages for the last voyage, in preference to all other creditors." "*Holston* not having established his claim to be of that character, for which a mortgage can be given on a vessel, his intervention must be dismissed." "The only remaining claim, is that of *Malcolm and Wood*, which is privileged against the owner, in its full extent. As to the claim of *Gedney*, the privilege is extinguished, the vessel having made several voyages since the debt accrued."

Holston and Gedney applied for a new trial, which was overruled. *Holston*, the mortgage creditor, appealed.

Carter, for the plaintiffs, made the following points:

1. The provisions of the La. Code, which admit that ships and other vessels may be mortgaged, when interpreted in connexion with the articles of the Civil Code and the maritime law, show that the mortgage must have grown out of the necessities of the trade of those vessels, or created for their advantage. *La. Code, art.* 3256, *No.* 4. *Civil Code, art.* 38, *p.* 458.

2. The provisions of both codes, when all taken together, show conclusively, that ships and all trading vessels, can only be mortgaged or hypothecated according to and are governed by the principles of the maritime law. *La. Code, art.* 3272, 3256. *No.* 4. *Civil Code, art.* 38, *p.* 458.

3. If there be a doubt as to the law, or if the articles of the codes are not positive, and establish the construction for which we contend, the interpretation given by the District Court should at any rate prevail, and that vessels or ships ought not in any case be susceptible of mortgage, unless for the use and to relieve the necessities of the vessel.

4. The account of the plaintiffs, is for supplies in money and articles furnished the vessel, which give a privilege on

her of the highest rank. The bare mortgage claim of Holston, the appellant, cannot in any respect be admitted in competition with our claim.

5. Vessels are subject to peculiar privileges known to all the world; but where an individual takes a mere mortgage for a sum lent, or to secure a debt due by the owner, it cannot affect the vessel, and the lender or creditor must abide the consequences, which the codes and the maritime law inflict in such cases.

Roselius, for the appellant.

1. Ships and other vessels, are made susceptible of conventional mortgage, by the positive enactments of our code. *La. Code*, 3256, *No.* 4.

2. The plaintiffs have no privilege on the vessel. If they ever had any, it has been lost by permitting the vessel to make a voyage. The privilege only attaches for supplies furnished, previous to the departure of the vessel.

Bullard, J., delivered the opinion of the court.

In this case the court is called on, for the first time, to consider and give an interpretation to those articles of the Louisiana Code, which relate to the mortgage of ships or other vessels. The question arises in the distribution of the proceeds of a schooner, sold in pursuance of a provisional seizure, sued out by Malcolm & Wood, to reimburse themselves certain supplies furnished by them, and for which they claim a privilege. Several persons intervened, and among others L. Holston, who exhibits a special conventional mortgage on the schooner, executed by the owner before a notary, and recorded in the office of the recorder of mortgages, in this city.

Article 3256 of the code, enumerates among the objects susceptible of mortgage, "ships and other vessels." When treating afterwards of conventional mortgages, it declares (article 3272) that "hypothecations of ships and other vessels, are made according to the laws and usages of commerce." The opinion that the legislature intended to

restrict the mortgage of ships, to the cases in which such hypothecation would be considered as valid, by the usages of commerce or the commercial law, is much strengthened by the fact, that by the same code, neither a judicial nor a legal mortgage attaches to that species of property. The hypothecary creditor can only exercise his right on immoveables and slaves. We have recently had occasion to examine the subject, in relation to the legal mortgage of the wife, to secure the restitution of her dower, and came to that conclusion. See *the case of Loze* vs. *Dimitry et al.*, *ante*, 485.

The provision in the Louisiana Code, that "ships and other vessels" are susceptible of being mortgaged, is restricted to hypothecations made according to the laws and usages of commerce. In whatever cases those usages and laws would recognise the validity of an hypothecation of a vessel, our Code also recognises it, *and in none other.*

The declaration that ships are susceptible of mortgage, is among the amendments of the old code, which contained no such enunciation in distinct terms. That code, after enumerating the objects susceptible of mortgage, and declaring that moveables shall no longer be subject to be mortgaged, either generally or specially, declares that "the present disposition, in no way alters or effects the dispositions of the maritime or trade laws, respecting ships and sea vessels." Although there is a difference in the phraseology of the old and new codes, there is in our opinion no difference substantially, in their provisions on this subject. They both recognise, as a general principle of our municipal law, that moveables are not susceptible of mortgage, but at the same time, admit an exception as to ships and vessels, under the maritime law, which as the compliment of the law of nations, founded on the general acquiescence of commercial states, regulates and controls the great interests of navigation and commerce, except so far as it is repugnant to a positive law of the state. The old code contains only a reference to the usages of trade, in relation to the hypothecation of vessels; the amendment simply declares, that ships and other vessels are susceptible of mortgage, and then qualifies the principle by declaring, that such hypothecations *are made* according to the laws and usages of commerce; the one leaves the principle, that ships are in some cases susceptible of mortgage, to be deduced as an inference from its general provisions on that subject matter; the other announces that susceptibility in positive terms, according to the forms, and in

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the cases established by the commercial law. We consider both as declaratory laws, recognising the existence of the commercial law, as a system distinct from, and co-existing with the municipal code, and giving effect to hypothecations of ships, made according to such usages, notwithstanding the general maxim, that moveables are not susceptible of mortgage.

Although it is generally unsafe to rely on arguments *ab in convenienti*, in the interpretation of laws, yet the view we have taken of this part of the code, is confirmed by a consideration of the consequences, which might result from a different conclusion. If it were settled as a principle, that a mortgage in the ordinary form, and to secure the payment of a debt, no matter what might be its origin or consideration, would follow the ship into whose ever hands it might come, and adhere to it amidst all the changes and hazards incident to navigation, how could the master of a vessel, belonging to the port of New-Orleans, procure funds in a foreign port, on the credit of her bottom; funds, perhaps absolutely necessary for repairs or other exigencies of the vessel? Such a system would not only be productive of injurious impediments to commerce, but might lead to enormous frauds. The purchaser of a vessel in any foreign port or at sea, looks only to the register or other ship-papers, to ascertain the title and the incumbrances. The principle now contended for, by the appellant, would compel him to resort to the office of the register of mortgages; and where is such a mortgage to be registered? We cannot suppose, that the legislature intended to subject those great instruments of commerce, "which are built to plough the seas, and not to rot by the walls," to the same incumbrances which attach to lands, situated within the constant operation of its laws, or to slaves, who, although capable of being removed, are generally destined to its cultivation. The emperor Antoninus, when interrogated concerning a question of navigation, repeated the declaration of Augustus, "I am the master of the earth, but the Rhodian law is mistress of the sea." He recognised, as our legislature has, the existence of a commercial code, upheld by general

So where a conventional mortgage on a schooner, executed by the owner, in favor of a creditor to secure the payment of a debt, and duly recorded in the mortgage office, was sought to be enforced: *Held*, that such a mortgage has no effect; and that ships are not subject to the same incumbrances which attach to immoveables, as lands and slaves, situated within the constant operation of the laws of the state.

consent, growing out of the mutual wants of nations, and founded on principles of natural equity, which are of universal obligation. In whatever cases those usages and laws would recognise the validity of an hypothecation of a vessel, our code also recognises it, and in our opinion in none other.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

TOBY *vs.* MAURIAN.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

No recovery can be had of the endorser, until demand of payment has been made on the drawer or maker, or on his heirs or legal representatives if he be dead, unless the impossibility of making such a demand is shown,

So where the maker of a note died on the last day of grace, the notary, on calling at his domicil being informed of his death, protested the note for non-payment, and notified the endorser thereof: *Held*, that there was no demand of payment sufficient to bind the endorser.

This is an action against the endorser of a promissory note, signed by A. Peychaud, for one thousand dollars, payable to the order of the defendant, and by him endorsed to the plaintiff. The latter alleges, that payment was duly demanded of the drawer, and the note protested for non-payment, of which the defendant as endorser had due notice. He prays judgment against said defendant for the amount of the note, interest and costs.

The defendant pleaded the general issue; admitted his signature, and averred that he was not liable as endorser, because the note had not been legally protested, nor had he been legally notified of its dishonor.

The protest states, "that the notary went to the house formerly occupied by the drawer in order to demand payment, and was informed by a servant whom he found there, (no other person being about the premises) that Peychaud, the maker of the note, was dead."

Vinot, the notary's clerk, states the note was protested on the last day of grace, being the 27th February, 1834. That on the day of the protest, he made demand of payment of the note, at the domicil of Mr. Peychaud, who was then a corpse in the house, and was told by a mulatto woman, the only person present, that it was the day of the funeral.

It was proved the defendant had notice of this protest. The evidence also showed, that the maker of the note left a widow and two brothers.

The district judge was of opinion no other demand was necessary, than simply to protest the note for non-payment, and notify the endorser thereof, and that he would be held liable. The court relied on the case of *Hale* vs. *Burr*, 12 *Mass. Reports*, 86, in support of its opinion. Judgment was given for the plaintiff, and the defendant appealed.

Lockett, for the plaintiff, insisted that this case did not come within any of the rules or principles established in former cases. That no demand was necessary in this case, but that the endorser was simply to be notified of the non-payment of the note, and that he would be looked to for payment.

2. He relies on the reasons and authorities referred to in the opinion of the district judge, as being correct, and which should prevail in this case.

Roselius and Mazureau, for the defendant, argued from the following points and authorities.

1. The defendant is not liable as endorser, because no demand of payment was made on the widow or heirs of the deceased, even at the domicil of the maker of the note; nor is there any thing equivalent to a demand of payment in this case.

2. A demand is absolutely necessary to be made on the maker of a note or bill, or of his heirs, or on his legal representative, if he be dead. Due diligence must be used to discover their residence; and none of these pre-requisites having been complied with in this case, the endorser is thereby discharged. *Chitty on Bills*, 268, *Am. ed.* 1817. *Ed. of* 1828, *p.* 317. *Bayley do.* 128. 2 *Practical Abr. of Com. Law Cases*, 288, 292. 3 *Peters*, 89. 7 *Ib.* 364. 1 *Pardessus*, 392. *Pothier Contrat de Change, No.* 146.

Martin J., delivered the opinion of the court.

The defendant is sued as endorser of a promissory note, for one thousand dollars, executed by Peychaud. Judgment was rendered against him for the amount claimed. He now claims a reversal of the judgment, on the ground that he was condemned as endorser to pay the sum demanded, when payment was never demanded from the maker, nor from any person representing him, or succeeding to his rights and obligations.

The record shows that the maker of the note, died on the last day of grace, or during the night preceding it. That when the notary's clerk called at the house and late domicil of the drawer of the note sued on, to demand payment, he found no person present, except a mulatto woman, who informed him of the death of Peychaud, and pointed him to the corpse in the coffin. The note was then protested without any inquiry or demand being made, of any heir or representative of the deceased.

It is clear that no recourse can be had against the endorser of a note, until a demand has been made on the maker, if living, or on his heir or legal representative after his death, unless the impossibility of making such a demand is made apparent. This has not been shown in the present case. The authorities on this point, and which support the position here laid down, are numerous; of the highest character and authority, and conclusive on this subject. *Chitty on Bills*, 317, *ed.* 1828. *Bayley do.* 128. 2 *Practical Abr. of Am. Cases*, 288, 292. 3 *Peters*, 89. 7 *Ib.* 287. 7 *Martin*, 364. 1 *Pardessus*, 392. *Pothier Contrat de Change, No.* 146.

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So where the maker of a note died on the last day of grace, the notary on calling at his domicil being informed of his death, protested the note for non-payment and notified the endorser thereof: *Held*, that there was no demand of payment sufficient to bind the endorser.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and that judgment be entered for the defendant, with costs in both courts.

OLIVIER *vs.* ANDRY.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The endorser of a note is not entitled to relief, on the ground of error or fraud, because the previous endorsement is a forgery committed by the drawer, unless he shows that such error was caused by the plaintiff, or that he participated in the fraud.

Whether the endorsement of a note was made for the accommodation of the drawer, or taken in the regular course of business, the holder can look to his immediate endorser, even if the endorsement preceding it is a forgery.

Every endorsement is essentially an original contract, equivalent to drawing a bill in favor of the holder, on the acceptor or obligor.

This is an action on a promissory note, protested, for four thousand dollars, against the second and last endorser, drawn by A. Foucher, jr. to the order of F. Saulet, on which his name was endorsed, and which was subsequently endorsed by the defendant.

The defendant admitted his signature and endorsement; but averred that the endorsement of Saulet was a forgery, known to the drawer thereof, for whose use and accommodation he endorsed the note; and that his endorsement was fraudulently obtained by the drawer's counterfeiting Saulet's endorsement, and without consideration.

The evidence showed that the plaintiff refused to take the note sued on, until the defendant assured him his endorsement was genuine. He then took it in renewal of another note of

the same drawer. It was also shown the note was duly protested for non-payment, and notice thereof given to the defendant. The defendant proved the endorsement of Saulet to be a forgery, committed by the drawer of the note.

On these pleadings and evidence, the cause was submitted to a jury.

The district judge refused to charge the jury, "that the endorser on a note, by the mere fact of endorsement, guarantied the genuineness of the signatures of the preceding parties thereto, to the subsequent endorsees and holders." But the judge charged in substance, that if the jury believed the plaintiff, who is the holder, was a party to the contract, by which the note in question was drawn and endorsed by all the parties to it, the name of Saulet being forged, is a fraud, which entered into the original contract, against which Andry the last endorser may avail himself; but if the holder was no party to the original contract, but took the note in the course of business, or discounted it after it was made, without any previous agreement with the parties to it, the forgery of Saulet's name as the first endorser, is no defence to the defendant, who is the second and last endorser.

The jury returned a verdict for the plaintiff. The defendant moved for a new trial, on the ground that the verdict was contrary to law and evidence, which being overruled and judgment rendered confirming the verdict, the defendant appealed.

Benjamin, for the plaintiff.

1. The only question which this cause presents is, whether in an action against an endorser on a negotiable note, the fact that a prior endorsement is forged, forms a legal defence against a *bonâ fide* holder.

2. The plaintiff contends that the defendant, by endorsing the note sued on, guarantied and admitted the signature of every antecedent party, and is liable even though such signatures were forged. This principle is fully established by the

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following authorities. *Bayley on Bills*, 312–13. *Chitty on Bills*, 397. 1 *Lord Raymond*, 443. 2 *Campbell, N. P. C.* 182. 10 *Wheaton*, 353.

3. But it was argued for the defendant in the court below, that this was an accommodation endorsement. This court has frequently decided that, in relation to third persons and *bonâ fide* holders, the obligations of accommodation endorsers were co-extensive with those of endorsers of business paper. See the cases of *Nolte* vs. *Their creditors*, 7 *Martin, N. S.* 12. *Weir* vs. *Cox*, 7 *Martin, N. S.* 369. *Dorsey* vs. *Their creditors*, 7 *Martin, N. S.* 499.

De Armas, for the defendant and appellant, insisted that the name of the first endorser being proved to be forged on the note, was sufficient cause to exonerate and discharge the defendant from his endorsement.

2. That the defendant endorsed the note in error, supposing the preceding endorsement to be genuine, which alone is sufficient to annul the engagement he thereby contracted. *La. Code*, 1875, 1876.

3. The engagement or contract of endorsement is void, by the nullity resulting from the fraud committed by one of the parties, to wit: the drawer of the note. *La. Code*, 1841–2.

Bullard, J., delivered the opinion of the court.

This suit is brought by the holder against the endorsers of a promissory note, and the record furnishes evidence of the endorsement, of a demand and protest, with due notice of non-payment.

The endorser of a note is not entitled to relief on the ground of error or fraud, because the previous endorsement is a forgery committed by the drawer, unless he shows that such error was caused by the plaintiff, or that he participated in the fraud.

The defence relied on is, that a previous endorsement on the note was not genuine but a forgery committed by the drawer himself, and that the note was endorsed by the defendant through error, he believing the previous endorsement to be genuine. The counsel for the appellant, in support of this ground, refers us to articles, 1875 and 1876 of the Louisiana Code. We are of opinion, that he is not entitled to be relieved on the ground of error or fraud, without showing

Whether the endorsement of a note was made for the accommodation of the drawer, or taken in the regular course of business, the holder can look to his immediate endorser, even if the endorsement preceeding it is a forgery.

Every endorsement is essentially an original contract, equivalent to drawing a bill in favor of the holder on the acceptor or obligor.

that such error was caused by the plaintiff, or that he participated in the fraud. Such in substance was the charge of the judge, on the trial in the first instance, and we think it correct. The plaintiff took the note in renewal of another by the same drawer, after making inquiry of the defendant, whether his endorsement was genuine, who assured him that it was. Nothing was said about the previous endorsement of Saulet. The plaintiff, therefore, took the note on the credit of the defendant's endorsement, and no privity is shown between the plaintiff and the drawer, in relation to the forgery. Whether the endorsement was for the accommodation of the maker, or in the regular course of business, is, in our opinion, immaterial. Every endorsement is essentially an original contract, equivalent to the drawing of a new bill in favor of the holder, on the acceptor or obligor. The obligation of the endorser is, that if the obligor or acceptor does not pay at maturity, he will pay, on due notice of the dishonor of the bill. The forgery of a previous endorsement, does not release him from that obligation towards a *bonâ fide* holder, who took the note on the credit of his endorsement. The doctrine on the subject appears well settled, and in our opinion the verdict of the jury was legal and correct. *Chitty on Bills*, 484.

It has been ruled in England, that the holder may declare against his immediate endorser, as on a bill of exchange, directed to the acceptor and payable to the plaintiff. *Ib.*, 461.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

BOREE, f. m. c. *vs.* KELLAR.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

Where a judgment was rendered by default and signed according to law' after the cause was set down for trial and the defendant notified thereof, he cannot afterwards obtain relief, by having the judgment set aside, and the cause tried *de novo*.

This is an action to recover from the defendant a slave, alleged to be worth eight hundred dollars, and his hire amounting to one hundred and fifty dollars in addition; which slave the plaintiff alleges, is in the possession of said defendant, who refuses to deliver him or to pay the amount of his hire.

The defendant pleaded a general denial. The counsel who put in the answer of the defendant, afterwards erased his name from the case, which was set for trial on a particular day, and the defendant notified in person to attend.

The plaintiff went on and took judgment by default, and which after the lapse of three judicial days, was signed by the judge.

The defendant filed his affidavit with that of his counsel setting forth a variety of circumstances, which caused a misapprehension in relation to the attorney who was to defend him, and in consequence of which, no defence was made, and averring he has a good defence to the plaintiff's action, which he has ever been ready to make. He prays that the judgment be opened and the cause tried *de novo*.

The parish judge overruled the application and the defendant appealed.

Soulé, for the plaintiff and appellee.

L. C. Duncan, for the appellant.

Mathews, J., delivered the opinion of the court.

In this case it appears by the record, that an answer had been filed on the part of the defendant, the cause at issue and regularly set down for trial. At the trial no person appeared to sustain the defence, nor did the defendant appear himself, although summoned.

The case was consequently tried *ex parte*, and judgment rendered in favor of the plaintiff, and signed by the judge three days after its rendition. In this state of things a motion was made in behalf of the defendant, to set aside the judgment thus pronounced and to have the case tried *de novo*, which being overruled by the court, the defendant appealed.

Where a judgment was rendered by default and signed according to law, after the cause was set down for trial and the defendant notified thereof, he cannot afterwards obtain relief by having the judgment set aside and the cause tried *de novo*.

The interests of the appellant seem to have been neglected in the court below, if he really has a good defence. But who is to blame for this negligence does not appear. In all events he cannot be relieved without a palpable violation of the rules of practice, on the subject of trial and judgment. See the case of *Small* vs. *Flint and Thomas*, *ante*, 352.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

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HERMANN ET AL.
vs.
LOU. STATE
INSURANCE CO.

HERMANN & SON *vs.* LOUISIANA STATE INSURANCE CO.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where A takes out a policy of insurance on a vessel, for *whom it might concern*, takes in a partner in the ownership of the vessel insured, and afterwards transfers the policy by special endorsement in his individual capacity to the plaintiffs, who show a total loss, payment of the loss to them, will liberate the underwriters. They contracted with A, and whether as principal or agent is immaterial.

Where the plaintiffs and intervening parties unite in a prayer, that the defendant be condemned to pay the sum demanded, and his liability is established, he will be required to deposit the money in court, to abide the final decision between the claimants.

This is an action to recover of the Louisiana State Insurance Company, the sum of four thousand dollars, on a policy of insurance taken out by Alexander Baron, on the schooner Eliza Thomas, "for whom it might concern."

The plaintiffs allege they are the transferees of said policy, and entitled to recover its amount. That the interest and ownership of said vessel was in Baron and Dufart, which has been lost by the perils insured against, and abandoned to the underwriters, of which they have had due notice.

The insurance company pleaded a general denial; admitted the execution of the policy, but specially denied that Baron and Dufart had any interest in the vessel as alleged, or that any proof was ever made thereof. They aver that any amount which may be due on said policy, has been seized under writs of *fieri facias*, one in the case of Kohn & Bordier *vs.* A. Baron, and the other in the case of Delpeuch *vs.* Dufart, of which matters they pray judgment and for general relief.

The evidence of the case shows, that on the 10th July, 1833, A. Baron caused insurance for four thousand dollars, for account of *whom it might concern*, to be made on the schooner Eliza Thomas, and on the 7th March, 1834, transferred the

policy by special endorsement, in his individual capacity to the plaintiffs.

A loss within the policy has been admitted and adjusted, at three thousand nine hundred and twenty dollars. No proof of interest was made until the present time.

The creditors of Baron and those of Dufart have intervened, but the case was tried as between the plaintiffs and the insurance company.

The plaintiffs produced in evidence an act of sale from Lesseps to Dufart, dated the 10th December, 1832; also, articles of partnership between Dufart & Baron, dated the 1st July, 1833, by which the schooner Eliza Thomas was put into the partnership.

On these pleadings and the testimony adduced by the plaintiffs, the cause was submitted to the court. The district judge was of opinion the *interest* in the property insured, was in Baron and Dufart, and that the former by his individual endorsement, did not transfer this interest to the plaintiffs. Judgment of non-suit was entered, from which the plaintiffs appealed.

Strawbridge, for the plaintiffs and appellants.

Eustis, contra.

Bullard, J., delivered the opinion of the court.

This suit was instituted by the plaintiffs as assignees of a policy of insurance effected by A. Baron, on account of whom it might concern, on the schooner Eliza Thomas, and subscribed by the defendants for four thousand dollars. They allege a total loss by the perils insured against, and a transfer to them of all interest in the policy, with notice to the underwriters, and that the interest and ownership of the schooner, was in Baron and Dufart.

The defendants deny generally the allegations in the petition, except the execution of the policy, and specially the interest in the schooner as alleged, or that any proof was ever

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made of it. The total loss is admitted and adjusted at three thousand nine hundred and twenty dollars.

Previously to the inception of the suit, a writ of *fieri facias* which issued on a judgment recovered by Kohn & Bordier, against A. Baron, was levied on the rights, credits, moneys, effects, &c. of Baron in the hands of the defendants. Another execution in the case of Delpeuch *vs.* Dufart, was levied on the same day, in the same manner, and particularly on the amount of the insurance on the schooner.

Kohn & Bordier intervened in this suit, and set up their right under the seizure in execution, denying any legal assignment by Baron to Hermann & Son. They pray that the defendants may be ordered to pay in court the amount due on the policy, and finally, that it may be adjudged to them in virtue of the seizure.

Antoine Delpeuch, the other seizing creditor, also, intervened, claiming the amount as the property of Dufart, who he alleges was the true and sole owner of the schooner. He prays that the money may be deposited in court.

The case was tried in the District Court, only as between the plaintiffs as transferees of the policy and the insurance office; and the court being of opinion that the whole interest in the policy did not pass by the assignment of Baron, pronounced judgment of non-suit, from which the plaintiffs, and Kohn & Bordier appealed.

Where A takes out a policy of insurance on a vessel for *whom it might concern*, takes in a partner in the ownership of the vessel insured, and afterwards transfers the policy by special endorsement in his individual capacity to the plaintiffs, who show a total loss, payment of the loss to them will liberate the underwriters. They contracted with A, and whether as principal or agent is immaterial.

The record furnishes such evidence of interest and a total loss, as to establish the liability of the defendants as underwriters of the policy. Whether Baron, with whom they contracted *for whom it might concern*, had a right to retain the whole amount when received, is a question which concerns him and those who claim a joint interest with him; but that a payment of the whole loss to him, would have liberated the insurers we do not doubt. They contracted with him, and whether as principal or as agent is quite immaterial. But if that were doubtful, the seizing creditors of his partner made themselves parties, and united in the prayer, that the defendants should be condemned to pay the loss, leaving the question still open to be decided by the court, whether Baron

or his assignees are entitled to retain the whole amount, or Dufart, his acknowledged partner, to come in for a share. That question is still open, as between the original plaintiffs and the intervening creditors of Dufart, as well as whether the creditors of Baron himself, are bound by his transfer to Hermann & Son, or in other words, whether as to them, that transfer was complete.

We are, therefore, of opinion, that the court erred in pronouncing judgment of non-suit against the plaintiffs.

Where the plaintiffs and intervening parties unite in a prayer that the defendant be condemned to pay the sum demanded, and his liability is established, he will be required to deposit the money in court to abide the final decision between the claimants.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed; and proceeding to give such judgment, as in our opinion, ought to have been rendered below; it is further ordered and adjudged, that the defendants deposit in the District Court, the sum of three thousand nine hundred and twenty dollars, with interest at five per cent. from judicial demand, and that they pay the costs of the District Court, as to the original plaintiffs only, together with the costs of this appeal; and it is further ordered, that the case be remanded to the District Court for further proceedings, as between the intervenors and the plaintiffs, all other costs to abide the final decision of the cause.

STEWART *vs.* PAULDING.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where the bidder to whom property is adjudicated at an auction sale, fails to comply with the terms and conditions of the adjudication, the seller may, at the end of ten days after the customary advertisements, re-sell the property, by advertising it according to law, ten days, and the bidder is liable for the deficiency in *price*, between the first and the second sale.

Neither the vendor or bidder, is obliged to perform his part of the terms of an auction sale, until requested to do so by the other.

The vendor of an auction sale has the choice of two remedies, in case of non-compliance by the bidder, *i. e.*, to demand the price, or have the property re-sold on account of the latter.

Where the judge *a quo* states the law in the way most favorable to the defendant in his charge to the jury, the latter has no cause to complain, and the verdict in this respect will not be disturbed.

This is an action by the vendor of an auction sale, to recover of the defendant two thousand and twenty dollars, the difference in price and commissions on the re-sale, between the first and second adjudications, in consequence of the bidder failing to comply with the first.

The defendant pleaded a general denial, and averred that the plaintiff could not make him a good title to the property bid off by him, within ten days after the adjudication, in consequence of which the sale became null and void; that after the property was put up and advertised to be re-sold, the sale was countermanded and postponed, so that the last sale can have no effect or validity against the defendant.

De Armas, witness for plaintiff, deposed, that on the 17th April, 1833, the plaintiff caused to be sold at public auction, a lot of ground with the improvements, which was adjudicated to the defendant, as the highest and last bidder, for eleven thousand eight hundred dollars. The plaintiff told witness he had agreed with the attorney of the defendant, to cancel

the sale if the title was not good, and requested witness to examine it with the defendant's attorney, which he did, and they found the titles to be correct; that the attorney of the defendant came to witness the same day, and told him that a deed of sale could be prepared, and a safe title passed; that some days after deponent saw the defendant, who told him he had arranged his affairs to go to the north, and would not take the property, inasmuch as he had agreed with the plaintiff to cancel the sale.

The lot was re-sold on the defendant's account, for ten thousand dollars. The difference in price was one thousand eight hundred dollars, and two hundred and twenty dollars commission on the re-sale.

The *procès verbals* of both sales, and the notices and advertisements of the second sale were produced, and the testimony of the auctioneers taken down in writing, constituted the principal part of the evidence on which the cause was tried.

The counsel for the defendant, excepted to the charge of the judge to the jury before they retired. The charge is fully set forth in the opinion of the court, delivered by *judge Martin.*

The jury returned a verdict for the plaintiff, on which judgment was rendered for the sum claimed. The defendant appealed.

Sterrett, for the plaintiff.

Hennen, contra.

Martin, J., delivered the opinion of the court.

The defendant is appellant from a judgment, which condemns him to pay the difference between the price, at which certain property was adjudicated to him at the first sale, and that for which it was adjudicated on a re-sale at public auction, on his refusal to comply with the terms and conditions of the first adjudication.

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STEWART *vs.* PAULDING.

Where the bidder to whom property is adjudicated at an auction sale, fails to comply with the terms and conditions of the adjudication, the seller may at the end of ten days after the customary advertisements, re-sell the property by advertising it according to law, ten days, and the bidder is liable for the deficiency in *price* between the first and second sales.

Neither the vendor or bidder is obliged to perform his part of the terms of an auction sale, until requested to do so by the other.

The vendor of an auction sale, has the choice of two remedies in case of non-compliance by the bidder, *i. e.* to demand the price, or have the property re-sold on account of the latter.

Where the judge *a quo* states the law in the way most favorable to the defendant in his charge to the jury, the latter has no cause to complain, and the verdict in this respect will not be disturbed.

The attention of this court is first drawn, by the counsel of the appellant, to a bill of exceptions taken to the charge of the district judge, delivered to the jury at the close of the trial. The judge told the jury, that on a non-compliance with the terms and conditions of an auction sale, by the last and highest bidder, to whom the property has been adjudicated, at the end of ten days, and after the customary advertisements, the property may be re-sold, and the first bidder is liable for any deficiency between the price of the property at the first sale, and that of the second adjudication.

"That the second sale need not be advertised during more than ten days, but the advertisements must be published in at least two news-papers, in the French and English languages, and notices of such sale put up at the court-house and church-doors."

"That if they believed the testimony of De Armas, the demand for a compliance with the terms and conditions of sale, at the first adjudication of the property, was waived."

"That neither the vendor nor the bidder are obliged to perform their parts of the terms and conditions of sale, until requested to do so by the other."

"That the vendor has the choice of two remedies, the demand of the price, or a re-sale of the property."

As this case is presented, it does not appear to this court, that the defendant has cause, or any right to complain of any part of the charge of the judge *à quo*, to the jury. He seems to have stated the law in the way most favorable to the defendant.

On the merits, it is shown that the defendant declared himself unwilling to comply with the terms and conditions of the first adjudication, on the most frivolous grounds, viz: that he was about making a trip to the northward. The only doubt that may arise in his favor, relates to the question of fact, whether the advertisements were duly made and published. The law on this part of the case was particularly stated, and explained to the jury in the way most favorable to the defence, in the charge of the court. The jury were satisfied as to the facts, and the court expressed its approval

of the verdict, by conforming its judgment thereto, without any attempt on the part of the defendant, to have the verdict set aside. *La. Code, art.* 2589. 3 *La. Reports*, 395, 123. 4 *Ibid.*, 150, 207, 258.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

PRIEUR & LABATUT *vs.* THE PRESIDENT AND DIRECTORS OF THE COMMERCIAL BANK OF NEW-ORLEANS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

In a suit, claiming of the defendants the right to exercise a certain office, withheld from them, the plaintiffs, with a view of securing the right to appeal, in case the judgment is adverse to their pretensions, may claim damages to an amount sufficient to give the appellate court jurisdiction.

The board of directors of the Commercial Bank of New-Orleans, is required by its charter, to consist of thirteen members, eleven to be chosen by the ordinary stockholders, and two by the city council, the city also being a stockholder: *Held*, that according to the charter, there is no distinction among the directors; they *all* have the right of voting, to fill all vacancies that may happen in either class of directors, in the board of which they are all members.

Where certain directors of a bank are refused by the majority, to exercise the rights in the board, appertaining to their office as directors, the court will award a *mandamus*, commanding that the prohibited directors be restored to the exercise of their rights.

In this case, the plaintiffs petitioned the District Court for a *mandamus*, directed to the president and directors of the Commercial Bank of New-Orleans, commanding them to allow the plaintiffs, who are the directors appointed on the

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part of the city council of New-Orleans, to vote as any other directors in said board, to fill all vacancies that have and may happen, as is authorised by the charter; and that the board of directors be enjoined from proceeding in any election, until these petitioners are heard in court, their rights as directors recognised, and they admitted to the full exercise thereof.

The counsel for the Bank answered the petition, and averred that the eleven directors elected by the stockholders, have the exclusive right to fill all vacancies happening in that class of directors, and in which the directors appointed by the city council of New-Orleans cannot participate.

The charter of the bank provides, that the board shall consist of thirteen directors, eleven of whom to be chosen by the ordinary stockholders, and two by the city council of New-Orleans, the city being also a stockholder, to the amount of five thousand shares.

The district judge was of opinion, that by the 8th section of the charter "the power of filling vacancies in the board of directors is vested entirely in the board, in which all the directors participate equally," granted *the mandamus* as prayed for. The president and remaining directors appealed.

Eustis, for the petitioners and appellees.

Conrad, contra.

Martin J., delivered the opinion of the court.

In this case, "the president and directors of the Commercial Bank of New-Orleans," are appellants from the decision of the District Court, by which they are commanded to allow the plaintiffs and appellees, (who are the directors appointed by the city council of New-Orleans) to vote as directors, for filling a vacancy, which has occurred in the board of directors of that institution.

The appellees pray that the appeal be dismissed, on the ground that the matter in dispute does not authorise an appeal, inasmuch as it is not susceptible of being appraised

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In a suit claiming of the defendants the right to exercise a certain office withheld from them, the plaintiffs, with a view of securing the right to appeal in case the judgment is adverse to their pretensions, may claim damages to an amount sufficient to give the appellate court jurisdiction.

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The board of directors of the Commercial Bank of New-Orleans is required by its charter to consist of thirteen members, eleven to be chosen by the ordinary stockholders and two by the city council, the city also being a stockholder: *Held*, that according to the charter there is no distinction

and estimated in money, and therefore *non-constat*, that its value is less than that which authorises this court to act.

It is the misfortune of the appellees, probably, that with the view of securing to themselves the right of having the judgment of the District Court examined in this, in case it was adverse to their pretentions, they have claimed damages to the amount of four hundred dollars. The appeal must therefore be sustained.

On the merits of the case, it appears to us that the judgment of the District Court is perfectly correct.

The 8th section of the act of incorporation of the Commercial Bank, provides "that in case of the death, resignation, failure, or removal from the state of any director, his place shall be filled by a new choice, made by the directors, for the remainder of the year."

The 3d and 6th sections provide for the election of *thirteen* directors by the stockholders. By the 21st section, the city council of New-Orleans is authorised to appoint two directors out of the thirteen, provided by the 3d and 6th sections, and the remaining *eleven* continue to be appointed by the rest of the stockholders, the city subscribing for five thousand shares.

One of the eleven directors appointed by the common stockholders, vacated his seat. The board of directors proceeded under the charter, to make choice of a director, to fill the vacancy for the remainder of the year, and the plaintiffs being the two directors sitting by appointment from the city council, claimed the right of voting in common with the other members of the board. This was refused by a majority of the board of directors. They immediately applied to the District Court for a *mandamus*, which was granted, directing the board to allow the directors appointed by the city council, the right of voting as other directors.

If the decision awarding the *mandamus* be incorrect, and if the directors elected by the ordinary stockholders, are entitled to exclude those appointed by the city council, when one of the former vacates his seat, it must follow that these directors are in their turn incapacitated to vote, if one of the two directors of the city vacates his seat, and that the remain-

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ing one alone is to fill the vacancy. This cannot be, as no individual director can alone constitute a board.

The act of incorporation has made no such distinction. All vacancies in the board are to be filled up in the same manner, *i. e.*, by the board of directors, which is composed of thirteen members.

among the directors; they *all* have the right of voting to fill all vacancies that may happen in either class of directors in the board of which they are all members.

No recourse is provided for a recurrence to the original electors, that is to say, the stockholders or the city council, in order to fill an accidental vacancy.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

WRIGHT *vs.* M'NAIR ET ALS.

APPEAL FROM THE COURT OF THE EIGHTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Where the judgment appealed from is not signed, the appeal will be dismissed with costs.

This suit was instituted for the recovery of five thousand dollars, which the plaintiff alleged the defendants owed him, for sundry pine logs furnished to them at their saw-mill, in the parish of St. Tammany. The plaintiff obtained a verdict for one thousand dollars, upon which the court rendered judgment on the minutes, but was not signed by the judge. After an unsuccessful attempt to obtain a new trial, the defendants appealed.

The case comes up without any statement of facts, made by the counsel or the judge, or any certificate of the judge or clerk, that the record contains all the evidence on which the cause was tried.

Preston, for the plaintiff, moved to dismiss the appeal, on the ground that there was no statement of facts made according to law, nor assignment of errors apparent on the face of the record. *Code of Practice, art.* 585, 602–3, 895–6.

Hennen, for the defendants, insisted, as the judgment appealed from was not signed, the cause must be remanded for further proceedings.

2. The verdict of the jury is not supported by evidence; there being no demand to put the defendants *in mora*. No damages can be claimed.

3. The defendants being sued as joint owners of a steam saw-mill, can only in any case be made liable for their *virile* portions.

4. There is no evidence of any contract with M'Nair, one of the co-proprietors; he is therefore not bound, inasmuch as the partnership is not commercial, but special.

Mathews, J., delivered the opinion of the court.

This case is before the court, on a motion to dismiss the appeal, on the part of the appellee, on the ground that the record does not contain a statement of facts, &c.

Where the judgment appealed from is not signed, the appeal will be dismissed with costs.

The counsel for the appellants, agrees that the appeal must be dismissed, but for a different cause, alleging that the judgment of the court below was not signed by the judge. As this is a sufficient reason for sustaining the motion of the appellee, we deem it unnecessary to examine the ground relied on by his counsel.

It is, therefore, ordered, adjudged and decreed, that this appeal be dismissed at the costs of the appellants.

BRADLEY *vs.* PROCTOR.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where the plaintiff, being dismissed by the defendant from finishing a certain job of work, relies upon the promise of the latter to have an estimation made of the work actually done and pay accordingly, but who neglected to cause such appraisement to be made, he ought to be bound by the estimation of appraisers appointed by himself: *Held*, that the plaintiff must show, either that the defendant concurred in the appointment of the experts, or that he was put legally in delay in relation to his promise, to make it binding.

This is an action for work and labor done by the plaintiff as a carpenter, on a sugar-house of the defendant, in which he claims a balance due, of six hundred and forty-two dollars forty-two cents, together with five hundred dollars in damages, for being dismissed before the work was completed.

The defendant pleaded the general issue; and denied specially that he was liable for any damages as alleged.

The evidence showed that while the plaintiff was at work on the defendant's sugar-house, under an agreement to do it by the job, the latter wrote him a note, "that the work done fell short of the contract, and he would not submit to it; that their contract was at an end, and he would have the work inspected and settle with the plaintiff agreeably to the value placed on it by the inspectors."

The defendant neglecting to have the inspection made, the plaintiff, nearly a month after his dismissal, called three house carpenters, who, in the presence of the defendant's overseer and son, sent to point out the defects, estimated the work actually done, at eight hundred and seventeen dollars forty-two cents, which after deducting a credit of one hundred and seventy-five dollars, leaves the sum sued for as due to the plaintiff.

The experts and others were called and examined as witnesses, touching the manner in which the work was done. The cause was submitted to a jury, without any counsel being present for the defendant, who found for the plaintiff, five hundred and fifty dollars, without allowing any damages.

The defendant had the verdict set aside, and a new trial awarded.

The case was tried by the court on a re-examination of the evidence produced by the parties. The district judge was of opinion upon the whole evidence of the case, that the plaintiff was entitled to one hundred and thirty-three dollars fifty cents, and gave judgment accordingly. The plaintiff being dissatisfied with the judgment, appealed.

Preston, for the plaintiff, insisted that the defendant was bound by his promise to pay the estimated value of the work actually done by the plaintiff; and failing himself to make the estimate as he promised, the latter had it done by master carpenters, who pronounced it reasonably good, and worth the sum sued for.

2. The defendant has proved by certain witnesses whom he called to examine the work, that it became necessary to pull it down. The time is not shown, but it is reasonable to suppose this examination was made, when the persons who made it undertook to pull it down, which was since the commencement of this suit.

3. No presumption can arise in favor of the defendant from taking down the work, because it is the act of a party to a suit while it is pending.

4. The district judge erred in not giving full credit to the testimony of the experts, who examined the work. They were men of experience and respectability.

Leigh, contra.

Bullard, J., delivered the opinion of the court.

The plaintiff sues to recover the value of carpenter's work done by him, on the sugar-house of the defendant, under a

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Where the plaintiff being dismissed by the defendant, from finishing a certain job of work, relies upon the promise of the latter, to have an estimation made of the work actually done, and pay accordingly, but who neglected to cause such appraisement to be made, he ought to be bound by the estimation of appraisers appointed by himself: *Held*, that the plaintiff must show, either that the defendant concurred in the appointment of the experts, or that he was put legally in delay in relation to his promise to make it binding.

contract to do a certain job, but which was not completed in consequence of his having been dismissed by the defendant, as he alleges, illegally. Judgment was rendered in his favor for a small part of his demand only, and he appealed.

The counsel for the plaintiff and appellant contends, that as the defendant offered, when he dismissed his client, to have an estimation made of the work actually done, and to pay accordingly, but neglected to cause such appraisement to be made, he ought to be bound by the estimate of appraisers appointed by himself, who estimated the work according to the account annexed to the petition. It is a sufficient answer to this argument to say, that if the appellant relies on that promise, he ought to show, either that the defendant concurred in the appointment of the experts, or that he was put legally in delay in relation to his promise. Neither of these is shown, and the court acted properly in deciding as to the value of the services rendered, according to the evidence offered on the trial, independently of any appraisement.

It is further urged, that no presumption results in favor of the defendant, from the fact that he took down and threw aside the work. It would be unreasonable as well as uncharitable to suppose, that any man would destroy what was useful to himself, out of mere wantonness. At the same time the mere fact that he demolished the work, ought to have no weight, unless it is shown, that it was either useless or not made according to contract.

The evidence relating to the value of the work done is contradictory. Some of the witnesses considering it reasonably good, and others of no value to the defendant. It is not pretended that the work was done strictly according to contract, and particular defects are shown, even by the witnesses of the plaintiff, which leave an impression on the mind, that the work was not done in a workman-like manner. The court below, with better means than we possess of testing the comparative credibility of the witnesses, allowed the plaintiff the full amount charged for extra work, and rejected altogether the charge for work done on the roof which was demolished. The evidence does not in our opinion, prepon-

derate so decidedly in favor of the plaintiff, as to authorise us to amend the judgment.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

ICAR *vs.* SUARES.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The rehibitory action, for the recission of the sale and return of the price of a slave, will be sustained, for any vice or defect which renders the slave either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed the buyer would not have purchased with a knowledge of the vices.

This is a redhibitory action, to annul the sale of a slave, and recover back the price, with the fees and costs of sale, on the ground of the redhibitory vices of craziness and running away. The plaintiff alleges he purchased a slave named Kate, from the defendant, for which he paid five hundred dollars in cash; that three or four days afterwards, it was discovered the slave was crazy and run away. He further alleges, that these vices and defects were known to the defendant; and that he has tendered the slave, demanded the annulment of the sale and return of the price, with the notary's fees, which the defendant refuses to comply with, and for which he prays judgment.

The defendant pleaded the general issue, and prays for general relief, and judgment in his behalf.

Several witnesses were sworn and examined on both sides. The plaintiff showed that the slave was very stupid; that on being told to do one thing she would do another; that she was unsafe to be trusted about the house, on account of the

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danger of setting fire to it; that she wandered off, and was finally put in the parish jail of an adjoining parish, as a runaway.

The defendant's testimony went to show, that the plaintiff took one or two slaves on trial, and finally concluded to buy Kate; that some days after she took the slave, she came to the store and informed witness she was very well pleased, and requested the defendant to pass an act of sale; that some days after the sale, plaintiff informed witness that Kate had absconded.

The district judge, in rendering judgment in favor of the plaintiff, remarked, "that with regard to the mental malady of the slave, the evidence and a *personal inspection* satisfied him, she was so far destitute of mental capacity, as to render her either absolutely useless, or the use so inconvenient, that it was to be presumed the buyer would not have purchased, had she known of the vice." The defendant appealed.

Cannon, for the plaintiff, urged the affirmance of the judgment.

Roselius, for the defendant, made the following points.

1. The evidence has not established, that the slave *Kate* is a runaway; nor is it even shown, that she ran away from the plaintiff after the sale.

2. With regard to the alleged craziness of the slave, the proof is entirely insufficient; the utmost that can be inferred from the testimony, is that she was rather stupid. This is an apparent defect, if a redhibitory defect at all, against which the defendant did not warrant the slave.

3. The district judge erred in taking into consideration his own impressions, derived from the appearance of the slave, from his personal inspection: he was not examined as a witness in the cause; and it is not even alleged that he possesses any particular skill on this subject.

Bullard, J., delivered the opinion of the court.

The plaintiff seeks to be relieved from a contract, by which she purchased from the defendant a recently imported slave, on account of two redhibitory vices, to wit: the habit of running away and madness. Judgment was rendered in his favor, and the defendant appealed.

The case turns altogether on matters of fact. We doubt whether the evidence establishes the habit of running away previous to the sale, but the opinion we have formed on the second ground, renders it unnecessary to give any positive opinion on the first.

It is contended that Kate was not crazy, but only stupid, and that stupidity is not madness, but on the contrary an apparent defect, against which the defendant did not warrant. Mere dullness of look is certainly apparent, but that degree of stupidity or want of intelligence, which results from a defective organization, is rather idiocy than stupidity. The code enumerates madness (*folie*) among the absolute vices of slaves, which give rise to the action of redhibition. Whether the subject of this action is idiotick from nativity, or is laboring under one of the numberless derangements of an intellect originally sound, is a question which cannot be answered, without further knowledge of her history, than the record affords. Nor do we consider it material, inasmuch as the code has declared, that a sale may be avoided on account of any vice or defect, which renders the thing either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed the buyer would not have purchased with a knowledge of the vice. *La. Code, art.* 2496.

The redhibitory action, for the rescission of the sale and return of the price of a slave will be sustained, for any vice or defect which renders the slave either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed the buyer would not have purchased with a knowledge of the vices.

We are satisfied from the evidence in the record, independently of the impression made on the mind of the judge, by personal inspection, that the slave in question was wholly, and perhaps worse than useless.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

COX *vs.* MITCHELL.

APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

In an action on the balance of account due, the plaintiff has a right to interrogate the defendant, touching the agreement of the latter to pay conventional interest.

The writing is not of the essence of an agreement to pay interest at ten per cent., but that the legislature only intended to exclude testimonial proof of such agreement.

Where the defendant neglects to answer interrogatories annexed to the petition, the facts required to be disclosed, ought to be taken as confessed.

This is an action to recover the balance of an account, due by the defendant to the plaintiff as a commission merchant, for advances, amounting to one thousand seven hundred and ninety-nine dollars fifty-three cents, payable the 9th May, 1831. The petition charges that the defendant agreed to pay conventional interest on each advance, from the time it was made until payment. Interest at this rate, is included on each advance, up to the time of striking the general balance now claimed, and the same rate of interest is claimed on this balance until payment.

The plaintiff annexed the following interrogatory to be answered by the defendant:

"Did you or not agree to pay the petitioner an interest at the rate of *ten per cent. per annum*, on all sums advanced by him to you from the day on which the advances were made, until their final reimbursement?"

The defendant pleaded a general denial, and averred that he and one Kendall were joint owners of a sugar plantation, and in the year 1830, consigned to the defendant, one hundred and twenty thousand pounds of sugar, and one thousand seven hundred gallons of molasses to be sold on their joint account; and which he expressly charges was fraudulently

and collusively sold to Kendall or some other person unknown to him, by said Cox, at three cents per pound, being one-half less than its real value, and at a loss of one thousand six hundred dollars, for which he prays judgment, and that the plaintiffs demand be rejected.

The plaintiff filed an amended petition, alleging that the sugar and molasses mentioned in the answer, is duly accounted for and included in the general account current annexed to his original petition, the balance of which is yet due as claimed. He then propounded a number of interrogatories to the defendant, which he requires to be answered, explaining and proving various items in the account, showing the business transactions between them, together with detailed accounts annexed. The amended petition and interrogatories were duly served on the defendant.

In an amended answer, the defendant charged the plaintiff with the additional sum of one thousand one hundred and twenty-four dollars eighty-nine cents, and also with five hundred dollars, the proceeds of thirty-four bales of tobacco, for which sums he prays judgment.

Before trial the defendant moved to have the interrogatory, requiring his answer concerning the agreement to pay ten per cent. interest on all the advances made to him by the plaintiff, stricken out, on the ground that it tended to establish a fact which could only be proved by written evidence. The court sustained the motion, and the plaintiff excepted to its opinion.

The defendant neglected to answer the series of interrogatories annexed to the supplemental petition, touching and explaining the various accounts and transactions between the parties.

Upon hearing a mass of testimony on the merits, and the explanations of the parties by their counsel respectively, the jury returned a verdict in favor of the defendant, for one thousand three hundred and eighteen dollars; after an unsuccessful effort to obtain a new trial, judgment being rendered in conformity to the verdict, the plaintiff appealed.

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A. & J. Seghers, for the plaintiff.

The account sued on in this case, is completely established by the interrogatories propounded to the defendant, which are to be taken as confessed by the refusal and neglect of the defendant to answer them. It is proved further, by the testimony of Kendall, former partner of the defendant, by the vouchers annexed to the petitions, and by the admissions of counsel.

2. The sums set up by the defendant in his reconventional demand as alleged in his several answers, are all accounted for and fully explained in the accounts rendered by the plaintiff.

3. The district judge erred in ordering the first interrogatory propounded to the defendant to be stricken out, by which the plaintiff was deprived of his testimony concerning the agreement to pay conventional interest. *La. Code, art.* 2255. 2895? 6 *Martin*, 280.

4. The interrogatories propounded, relative to the several accounts and transactions between the parties, should have been ordered by the court to be taken as confessed, and all the facts stated therein as proved in favor of the plaintiff, and the jury instructed to receive them as proved and admitted. *Code of Practice*, 349.

5. The verdict of the jury is clearly contrary to the evidence of the case, and if this court is not willing to render a final judgment on the merits, on the evidence in the record, it will remand the case for a new trial, with directions that the defendant be required to answer relative to the agreement to pay conventional interest.

Nicholls & Taylor, contra.

Bullard, J., delivered the opinion of the court.

The appellant relies for a reversal of the judgment rendered against him, on the grounds, 1st. That the court erroneously dispensed the defendant from answering an interrogatory, annexed to the petition, by which the plaintiff sought to prove that the defendant had agreed to pay an interest at ten per

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cent. on certain advances made by him, as commission merchant, which interest formed an item in the account annexed to the petition; and, 2d. That, although the defendant had neglected to answer certain interrogatories annexed to a supplemental petition, no effect was given to such neglect or refusal to answer, but that the facts, which, under those circumstances, should have been taken as confessed, were entirely overlooked by the jury in rendering their verdict.

We are of opinion that the court erred in striking out the interrogatory touching the defendant's agreement to pay conventional interest. It has been settled in this court, that writing is not of the essence of an agreement to pay interest at ten per cent., but that the legislature only intended to exclude testimonial proof of such agreements. 6 *Martin*, 278.

It is also clear, that if the defendant neglected to answer the interrogatories annexed to the supplemental petition, the facts required to be disclosed, ought to be taken *pro confessis*. But as the case cannot be examined on the merits, we express no opinion as to the correctness of the verdict.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled and reversed, the verdict set aside, and the case remanded for a new trial, with directions to the judge not to dispense with the answer of the defendant to the interrogatory touching conventional interest, and that the appellee pay the costs of this appeal.

In an action on the balance of account due, the plaintiff has a right to interrogate the defendant, touching the agreement of the latter to pay conventional interest.

The writing is not of the essence of an agreement to pay interest at ten per cent., but that the legislature only intended to exclude testimonial proof of such agreement.

Where the defendant neglects to answer interrogatories annexed to the petition, the facts required to be disclosed, ought to be taken as confessed.

CLARK ET ALS. *vs.* GIFFORD ET ALS.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

The signal for *steam*, made by the captain of a vessel on entering the mouth of the Mississippi river, does not confer on him the obligation of a contract of towage, with the first tow-boat coming along side. Up to the time when the ship is actually taken in tow, and the voyage commenced, the captain of the vessel is at liberty to change his mind, and employ another boat.

No usage or custom of steam-boats and tow-boats, that the first coming along side of a ship, on a signal made for *steam*, has thereby an absolute towage contract, at an established rate, to tow the vessel into the port of New-Orleans, *is binding*, when such custom has only prevailed five or six years, among those having an interest in establishing it.

This is an action against the captain and owners of the ship Tarquin, to recover of them three hundred and fifty dollars, for an alleged breach of contract, to tow said ship from the Balize to New-Orleans.

The plaintiffs allege they are joint owners of the tow-boat Huntress, and that at the special instance and request of the master of said ship, made known by signal, they came along side, made fast, and commenced towing the ship, the contract being expressly and tacitly agreed on with the captain, to tow her to the city for three hundred and fifty dollars; when without any cause or reason, but merely through whim captain Gifford refused to be towed by the Huntress, and employed another boat. The plaintiffs now claim the sum of three hundred and fifty dollars, as the price due on their contract, in undertaking and agreeing to tow said ship to the city of New-Orleans, from the Balize.

The defendants pleaded a general denial.

The evidence on which the case was tried, is fully stated in the opinion of this court.

The parish judge decided, that the testimony established it as the prevailing rule or custom of tow-boats, on the Mississippi, that when a vessel makes signal for *steam*, the first boat that gets along side, is entitled to tow her up.

2. That this rule or custom being thus established, every vessel making signal for steam, comes under an implied contract, to be towed by the first boat coming along side.

3. An exception might probably exist, if the boat offering her services, was not of sufficient power.

4. It is in evidence in this case, that the tow-boat Huntress, on signal made from the ship Tarquin, was the first boat along side, and boarded, and after being nearly made fast, was discharged by the captain of the ship, and the tow-boat Grampus employed to tow her.

5. That the Grampus is shown by the testimony, to be of less power and speed than the Huntress.

6. That the price of towage is proved to be three hundred and fifty dollars. Judgment was rendered accordingly for this sum. After an unsuccessful attempt to obtain a new trial, the defendants appealed.

Roselius, for the plaintiff.

1. The contract is sufficiently proved. The captain of the Tarquin made a general signal for *steam*, which must be considered as a proposition, and the coming along side by the Huntress, was an acceptance of the proposition, by which the contract was completed. *La. Code*, 1792, *Ibid.*, 1811.

2. The usage is sufficiently shown, and may be considered as additional evidence of the contract. *La. Code*, 1958, 1961.

The *quantum* of damages is fully established by the evidence. *La. Code*, 1928.

T. Slidell, for the defendants. The custom or usage relied on, to sustain the plaintiffs' demand, should be repudiated.

1. Because it is in evidence, that the tow-boats have only been in use on the Mississippi, for about the last six years, and

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a custom cannot grow up and assume the force of law, in so short a period. *La. Code, art.* 3. 2 *Starkie, Note* 450. *Febrero, part* 11, *lib.* 1, *cap.* 5, § 4, 26. 1 *Pothier, Clef des Lois Romaines Coûtume,* 159.

2. Even if a custom could be established in so short a time, yet the evidence adduced by plaintiff is not sufficient to prove its existence. 1 *Gallison,* 444. 1 *Martin, N. S.* 192. 2 *Starkie on Evidence,* 448. *Febrero, ubi super.*

3. Even were the custom sufficiently proven, it should not be recognised, because it is neither consistent with natural equity, nor with the spirit of positive laws on the subject of obligations. 1 *Pothier,* 165.

4. Although the court should consider, that under the circumstances, and by force of the usage set up, the defendant must be deemed to have contracted to employ the plaintiff to tow his vessel to New-Orleans, yet the damages given for the inexecution of this obligation are excessive, and should be reduced to the amount of loss actually sustained by plaintiff. *La. Code,* 1924, 1928, *sec.* 1, 2, 3.

Mathews J., delivered the opinion of the court.

This is a suit brought by the captain and owners of the steam-boat Huntress, employed as a tow-boat for vessels, passing between New-Orleans and the Balize, against the captain and owners of the ship Tarquin. The plaintiffs base their action on a contract for towing, made between the captain of the steam-boat and the captain of the ship, by which it was agreed between the parties, that the latter should be towed to New-Orleans by the former, at the usual or customary price for such a voyage of towing, which is averred to be three hundred and fifty dollars. Judgment for this sum was rendered against the defendant, in the court below, from which they appealed.

The testimony of the case shows it to be novel, and although not of much consequence as relates to the amount in controversy, it may be considered somewhat important, as

establishing principles concerning the interpretation of contracts like that on which the plaintiffs rely for a recovery in the present instance.

It appears by the testimony, that the ship was at an anchor, in the south west pass of the Mississippi, having been piloted over the bar, At the same time, two tow-boats were laying some distance below her. A signal for steam appeared on board the ship, and these two boats got under way and approached her, the boat for the benefit of whose owners the value of the towage is claimed, and the Grampus. The former came first along side the ship, and was about making fast to her for the purpose of towing, when the captain of the vessel refused to be towed by her, and was finally, by agreement, towed to the city by the latter. These we believe to be all the important facts established by the testimony.

From these facts a question arises, whether any contract was created, binding on the parties, sufficient to compel the master of the tow-boat to convey the ship to the port of New-Orleans, and to oblige the captain of the latter to submit his vessel to be towed by the former, from the *terminus a quo* to the *terminus ad quam*, and to pay the usual price of such towage.

Contracts are either express or implied, from which obligations arise to do or not to do, &c. To their perfection they require the consent of two parties at least, or the concurrence of two wills. When this consent is made by words, in the ordinary mode of conveying ideas from one person to another, they are express; when an obligation results from the circumstances of a case, the contract is said to be implied or tacit, that is when the agreement is not entered into by words or writing, and although a contract may be made by signs, yet as they are not the ordinary mode of communicating ideas, such a contract must be viewed as partaking rather of the latter class than the former; but the obligations resulting from either species, may be enforced; in other words, the obligations arising from both, are what the law terms perfect.

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The contract contended for on the part of the plaintiffs, is tacit, being made by signs, and if it were complete would produce reciprocal obligations on the parties, *i. e.*, if it necessarily results from the signal given by the captain of the ship, and the subsequent conduct of the master of the tow-boat, that the one asked the other to tow his vessel to New-Orleans, and the latter consented so to do, the contract would be complete, and obligatory on both the contracting parties; but on general principles of law, we do not think the facts of the case authorise such a conclusion. We take for granted, that the commanders of most of the vessels, if not all, arriving from sea at the mouths of the river, know that there are a number of steam-boats in the neighborhood, whose constant employment is to tow such vessels to the port of New-Orleans, and that their masters are always ready and willing to answer any signal for steam, by conducting that boat to the place of the signal. Such signal seems to us, to express nothing more on the part of a captain who makes it, than a wish or desire to have his ship aided in her progress by a steam-boat, but does not amount to an absolute consent and agreement to be towed by the first boat that may choose to come along side of his vessel, or any other that may subsequently come near to her. He would be at liberty to change his mind, and refuse to be towed, up to the time when his vessel was actually taken in tow, and the voyage commenced; and on such change of will, no contract would properly take place, in relation to any particular voyage. If therefore, the master of the vessel could refuse altogether to be towed, without violating any contract, because none had really been made, it follows as a corrollary, that when two boats make their appearance, a commander of a ship may contract with the proper officer of one of them, as he may select, without any injury to any rights of the other, which was done in the present case. Though perhaps when on a signal for steam, only one boat approached the vessel, and the captain refused to be towed, he and his owner might be bound to remunerate the owner of the boat for the unnecessary trouble and expense

The signal for *steam*, made by the captain of a vessel, on entering the mouth of the Mississippi river, does not confer on him the obligation of a contract of towage with the first tow-boat coming along side. Up to the time when the ship is actually taken in tow, and the voyage commenced, the captain of the vessel is at liberty to change his mind, and employ another boat.

No usage or custom of steam-boats and tow-boats, that the first coming along side of a ship on a signal made for *steam*, has thereby an absolute towage contract, at an

to which they may have been put, by the wavering and indecisive conduct of the person who caused such expense.

As to the arguments based on the proof of a pretended custom, prevailing amongst the different masters and owners of tow-boats, plying between the city and the Balize, we consider them as entitled to little consideration. It would be an extraordinary occurrence in legislation, established by custom and usage, to give to a few steam-boat captains, and the owners of tow-boats authority to make laws, in consequence of a usage which relates solely to their own interests, of a duration of not more than five or six years, to have a binding force on the owners of vessels over the whole world.

established rate, to tow the vessels into the port of New-Orleans, *is binding*, when such custom has only prevailed five or six years among those having an interest in establishing it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be avoided, reversed and annulled; and it is further ordered, adjudged and decreed, that judgment be here entered for the defendants and appellants, as in case of non-suit, with costs in both courts.

KIMBALL & LILLY *vs.* NICHOLSON.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where the decision of a case depends wholly on matters of fact, and when, on an examination of the testimony, it warrants the verdict of the jury, the judgment rendered thereon will not be disturbed.

This was an action to recover damages against the defendant, for the loss by fire of the steam-boat Saratoga, while in the custody of the defendant. The plaintiffs allege the boat was destroyed through the negligence, carelessness and fault of the defendant, for which he is personally liable.

The defendant pleaded a general denial, and that said boat had been legally seized under a writ of seizure, from

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the United States District Court, and was at the time of her accidental loss by fire, in his custody as marshal of the United States; and that said accident happened without his fault, for which he is not liable.

On these issues and pleadings the parties went to trial; a mass of testimony was taken, and the whole case submitted to a jury, who returned a verdict for the defendant. The plaintiffs appealed from the judgment confirming the verdict.

I. W. Smith, for the plaintiffs and appellants.

Conrad, contra.

Mathews, J., delivered the opinion of the court.

This is a suit against the defendant, who is marshal of the United States, for the Eastern District of the State of Louisiana, in which damages are claimed from him, on allegations of negligence and misconduct, in keeping and guarding the steam-boat Saratoga, (of which the plaintiffs were owners) whilst in his custody under seizure, by order of the District Court of the United States, &c.; the boat having been consumed by fire during that period.

Where the decision of a case depends wholly on matters of fact, and when, on an examination of the testimony, it warrants the verdict of the jury, the judgment rendered thereon, will not be disturbed.

The cause was submitted to a jury in the court below, who found a verdict for the defendant, and judgment being thereon rendered, the plaintiffs appealed.

The decision of the case depends wholly on matters of fact. We have examined the testimony, and are of opinion that it warrants the verdict and judgment of the court below.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

HESSIAN *vs.* FERGUSON.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where a passenger engages his passage on deck or in the steerage, and in consequence of continued intoxication and ridiculous conduct, is made the butt and sport of the other passengers, without the interference of the captain, the latter is not liable in damages for such treatment during the voyage.

This is an action for damages against the defendant, as captain of the schooner Mayflower, for alleged ill treatment of the plaintiff, on a late voyage from Charleston to New-Orleans.

The defendant pleaded a general denial.

The evidence shows that the plaintiff was during a great portion of the voyage, in a state of mental derangement, occasioned by frequent and large potions of brandy, and while in that state his conduct was very odd, eccentric and ridiculous, so as to provoke the ridicule and pranks of the passengers on board. It did not appear that the captain interfered in any way; and the plaintiff received no personal injury or harm, except getting powder burnt from the flash of a pistol in his face.

On hearing all the testimony the district judge gave judgment for the defendant. The plaintiff appealed.

Kelly and Kennicutt for the plaintiff.

1. The defendant, as commander of the vessel, was bound to protect the plaintiff, a passenger on board, from insult and abuses which were continually heaped on him during the voyage.

2. The proof makes out a case of great hardship on the part of the plaintiff, for which he is entitled to exemplary damages. The judgment of the District Court should therefore be reversed.

Preston, contra.

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Bullard, J., delivered the opinion of the court.

The plaintiff complains, that having taken his passage as a cabin passenger on board a schooner commanded by the defendant, from Charleston to New-Orleans, he was during the passage grievously ill treated by him. That he was, after being at sea some days, forcibly expelled from the cabin, bound with ropes, exposed on deck without shelter, and not allowed sufficient food, to his damage one thousand dollars.

The judgment of the District Court was in favor of the defendant on the merits, and the plaintiff appealed.

The evidence clearly shows that the plaintiff engaged his passage on deck or in the steerage, and that he was not a cabin passenger. The captain was not, therefore, bound by contract to give him cabin room, nor perhaps provisions. But it appears that the plaintiff ate with the crew and fared as they did. In some respects he appears to have fared better; for although in common with the sailors he was put on short allowance, yet he did not stint himself in his allowance of brandy, of which he laid in abundant stores at Charleston. The consequence was, that during the voyage he gave unequivocal evidence of *mania à potu*, was on the look out for a ferry boat to take him ashore and could not sleep. Under these circumstances he became the butt of ridicule to other passengers on board, who appear to have amused themselves rather roughly at his expense. It is shown that the captain remonstrated with them on the subject and did nothing himself to annoy the plaintiff. The plaintiff received no personal injury, and we think with the court below, that no man ought to complain of being ridiculed when he has made himself ridiculous.

Where a passenger engages his passage on deck or in the steerage, and in consequence of continued intoxication and ridiculous conduct, is made the butt and sport of the other passengers, without the interference of the captain, the latter is not liable in damages for such treatment during the voyage.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

DELPEUCH *vs.* DUFART.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

In an action by the principal against his factor, to account and pay over a balance for merchandise sold on consignment, it devolves on the latter to show he has not received any money by the sale of the goods, or collected any of the debts, and to establish this to be the case *without his fault*, in order to avoid being liable.

This is an action on behalf of the late commercial firm of Delpeuch & Co., against the defendant as a factor, to compel him to pay over the balance due on an invoice of goods, sold by him at Tampico, on account of the plaintiff's late firm.

The petition charges, that the firm of Delpeuch & Co. consigned to the defendant, then residing at Tampico, an invoice of goods, which the latter sold together with goods of his own, to the firm of Sennisson & Stock, for forty thousand five hundred and eighteen dollars and twenty-eight cents; that fifteen thousand nine hundred and seventy-one dollars and nineteen cents of this sum, belonged to the plaintiff's firm as their proportion of the stock of goods thus sold; and that they have received but four thousand and seventy-eight dollars, leaving a balance of eleven thousand eight hundred and ninety-three dollars yet unpaid, for which they pray judgment.

The defendant excepted to the plaintiff's right to sue in this case, on the ground that other suits had been instituted, and were now pending by the said firm of Delpeuch & Co., for the same cause of action. The district judge overruled the exception.

The defendant pleaded the general issue, and averred that he had not received from his vendees, the money claimed by the plaintiff, and was not liable for the same in this action.

The evidence shows, that Delpeuch & Co., in August, 1830, shipped to the defendant at Tampico, for sale on their

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account, a quantity of merchandise, which, with others belonging to the defendant and one Canez, in the same month, were sold to Sennisson & Stock, merchants in Tampico, for forty thousand five hundred and eighteen dollars, and their notes taken on short time. The amount of Delpeuch & Co's. interest in this sale, is alleged to be fifteen thousand nine hundred and seventy-one dollars, and a balance of eleven thousand eight hundred and ninety-three dollars, is shown to be yet due to them.

In October, 1831, Delpeuch dissolved with Castelman, and in the articles of dissolution it was recited, that as Sennisson & Stock were indebted to Delpeuch & Co., in the sum of eleven thousand eight hundred and ninety three dollars, on the goods sold to them by Dufart, it was agreed that Delpeuch, who was charged with the liquidation of the partnership, should take this debt for eight thousand dollars, and to account if more was received, and allowed half of the deficiency if less.

It was shown, that a judgment had already been rendered against Castelman and Dufart, for four thousand dollars on this agreement.

Previous to the dissolution, Dufart rendered an account to Delpeuch & Co., in which he says, "the sums which follow, remain to be collected for merchandise which I have sold on their account up to this time, and from which I am discharged;" and among the items or sums thus stated, is one of eleven thousand eight hundred and ninety-three dollars, due by Sennison & Stock.

At the foot of the account, Dufart says, "it is through error that it is said in the account current, that Delpeuch & Co. ought to be charged with the sum due by Sennisson & Stock. I am charged with the recovery, amounting to eleven thousand eight hundred and ninety-three dollars, &c., on which I am to have a commission, &c."

In March, 1832, Sennisson & Stock wrote to Dufart, then at New-Orleans, that they would be compelled to abandon the balance of the merchandise to him, which they had purchased, and which they did, accompanied by an invoice and

account, showing they still owed Dufart one thousand four hundred and seventy dollars.

It appeared from all the accounts, that in the return of the merchandise and credits for sales made, Dufart received in all, twenty-one thousand five hundred and seventy-nine dollars, from Sennisson & Stock. Delpeuch claimed fifteen thousand nine hundred and seventy-one dollars originally, and his share on the sum received would be eight thousand four hundred and sixty-one dollars, of which he had already received four thousand and seventy-eight dollars, and has a judgment against Castelman and Dufart for four thousand dollars.

The district judge gave judgment of non-suit. The plaintiff appealed.

Soulé, for the plaintiff, insisted on a reversal of the judgment, because the district judge admitted, that it is clearly proved there is a balance due to Delpeuch & Co., of eleven thousand eight hundred and ninety-three dollars.

2. That Dufart is accountable for the goods and credits abandoned to him by Sennisson & Stock, inasmuch as he took them at his own risk. This matter has also been fully settled between Dufart and Sennisson, by a judgment, to which Dufart has submitted.

3. Admitting that Dufart is not bound to account for the credits transferred to him by Sennisson & Stock, until they are collected, he is accountable to Delpuech for his proportion of seventeen thousand five hundred and eighteen dollars, the amount of goods abandoned to him.

4. That under all the circumstances, Dufart having accepted the abandonment by Sennisson & Stock, and had the immediate control of the goods and credits thus transferred, from March, 1831, judgment should have been given, ordering him to account for the same to the plaintiff.

Canon, contra.

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Martin, J., delivered the opinion of the court.

The plaintiff being charged with the settlement of the affairs of the late firm of Delpeuch & Co., consisting of himself and D. Castelman, as the sole and only members thereof, alleges, that said firm consigned to the defendant, residing at the time in Tampico, an adventure or parcel of merchandise, belonging partly to himself and partly to Canez, for an aggregate sum of forty thousand five hundred dollars, in which fifteen thousand nine hundred and seventy-one dollars and fourteen cents was included, being the amount of merchandise consigned by the said firm of Delpeuch & Co.; that the defendant has accounted for only the sum of four thousand and seventy-eight dollars, which leaves a balance of eleven thousand and ninety-three dollars and ninety-seven cents, and interest, still unpaid and unaccounted for, for which the plaintiff has instituted this suit.

The answer of the defendant denies his accountability, and avers that he has never received payment from his vendees.

The District Court gave judgment of non-suit, and the plaintiff appealed.

The counsel for the plaintiff contends, that the judgment ought to be reversed, on the following grounds:

1. The balance claimed is admitted by the district judge, to have been established.

2. The defendant is accountable for certain goods and credits, which he received from his vendees, as he took them at his own risk; and the matter has been settled as it appears by a judgment in which he has acquiesced.

3. These goods and credits were received on the 31st of March, 1831, and the last balance of account between the defendant and his vendees, was struck in February, 1833; that it also appears the merchandise received was of the value of seventeen thousand five hundred and sixteen dollars and fifty cents, and the credits only amounted to three thousand four hundred and thirty-eight dollars. From this statement it results, that admitting all the goods received in February, 1833, had been re-sold in the defendant's hands,

he retains the sum of two thousand eight hundred and sixty-eight dollars, to cover such a deficiency as may result from the credits, and admitting further, that he cannot be accountable for those credits until he collects the amount of them; he is certainly accountable for the value of the merchandise, until he shows it has been lost without any fault of his.

4. The District Court should have compelled the defendant to account.

This court is of opinion, the District Court erred in non-suiting the plaintiff, on the ground that he did not show the defendant had received any money by the sale of the merchandise, nor collected any of the debts. It was the duty of the defendant to establish, that this was the case without his fault.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and that the case be remanded for a new trial; the appellee paying costs in this court.

POLICE JURY VS. MENARD.

In an action by the principal against his factor, to account and pay over a balance for merchandise sold on consignment, it devolves on the latter to show he has not received any money by the sale of the goods, or collected any of the debts, and to establish this to be the case *without his fault*, in order to avoid being liable.

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APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

The certificate of the clerk, that the record contains "a true copy of all the proceedings, as well as of all the documents filed in the suit," is insufficient to enable the court to examine the case on its merits, and the appeal will be dismissed.

This is a hypothecary action against the third possessor. The police jury for the parish of Assumption, obtained a judgment against a surety of the sheriff of said parish, in

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1828, and on issuing execution it was returned, *no property found.* Suit was commenced against the defendant, to subject a tract of land which he had purchased from the surety, since the latter had become liable on his bond, on the ground, that a legal mortgage attached to all the property of the sureties to the sheriff's bond.

Judgment being rendered against the defendant, for the sum claimed with mortgage, after an unsuccessful attempt to obtain a new trial, he appealed.

On sending up the transcript, the clerk certified that it contained "a true copy of all the proceedings, as well as of all the documents filed in the suit."

A. Seghers, for the plaintiffs, moved to dismiss the appeal, on the ground that the certificate of the clerk, was insufficient to enable the court to try the case on its merits.

Nicholls, contra.

Martin, J., delivered the opinion of the court.

In this case a motion is made by the counsel of the appellees, to dismiss the appeal, on the ground of the insufficiency of the certificate attached to the record.

The certificate of the clerk, that the record contains "a true copy of all the proceedings as well as of all the documents filed in the suit," is insufficient to enable the court to examine the case on its merits, and the appeal will be dismissed.

The clerk attests that the transcript contains "a true copy of all the proceedings, as well as of all the documents filed in this suit."

This certificate is clearly insufficient; it does not negative the fact that oral evidence was given, nor that documentary evidence was produced which is not filed.

It is also clear, the certificate does not authorise this court to revise the judgment appealed from.

It is, therefore, ordered, adjudged and decreed, that the appeal be dismissed with costs.

BERLUCHAUX *vs.* BERLUCHAUX ET ALS.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY OF NEW-ORLEANS.

The mother or surviving parent, as tutor or tutrix, may refuse the administration of her minor children's property, yet retain the superintendence of them and the care of their education.

The person appointed to manage and administer minor's property, on the refusal of the natural tutrix to take that office, is termed a tutor *ad bona;* and this appointment may be made to minors of a person other than the natural tutrix, even when she is present and residing in the State.

A mother residing in a foreign state or country with her minor children, who inherit property in this, on coming here would be preferred to all others in obtaining the administration of their inheritance.

Where a surviving parent resides in a foreign state or country with his children who inherit property in this, he could, perhaps, on proof that he had complied with the laws of the country where he resided and had obtained full authority, as tutor, to administer his wards' property, appoint an attorney in fact to represent their interests, at least so far as to make partition of a succession held in common with co-heirs residing here.

The Spanish law having been in force in Louisiana, until the repealing act of 1828, the court will recognise it in relation to cases arising under the government of Spain, without requiring it to be proved as a fact.

According to the Spanish law, the tutorship of the mother is required to be conferred and confirmed by the judge in the same manner as of any other near relation on whom the office is cast by law.

The father may confer the tutorship of his legitimate children by will, which supersedes any appointment by the judge.

It is the duty of the relations of a minor, residing in this state, to provoke the appointment of a tutor, whether the minor be or be not domiciliated therein.

Where a minor resides in a foreign country and inherits property in this state, a tutor *ad bona* must be appointed to make partition or administer it.

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This is an action of partition. Pierre Berluchaux, the plaintiff, and Antoine and Joseph Berluchaux were the children of Charlotte Broyard, by her first marriage with Simon Berluchaux. She afterwards married V. Daublin, and died after her second husband, leaving in her will to her three children, among other dispositions, two lots of ground with the buildings thereon, and a slave in New-Orleans, which remains undivided. Joseph Berluchaux died since the will was admitted to probate, leaving a daughter, Amanda Berluchaux, his only child, residing with her mother in the Island of Cuba. The plaintiff is unwilling to hold this property in common with his co-heirs, and demands a partition by licitation or sale.

A dative tutor was appointed by the Probate Court of New-Orleans to represent the minor heir of Joseph Berluchaux, residing in Cuba. The testamentary executor of the widow Daublin, the dative tutor of Amanda Berluchaux and the other co-heir were duly cited.

The testamentary executor answered and consented to the sale and partition as requested, provided the proceedings were legal. The dative tutor answered, and averred he had been appointed by the advise and consent of an alleged family meeting, to represent said minor, while she still resided with her mother and guardian in Cuba; and that he is now advised his appointment is illegal and prays to be discharged.

Antoine Berluchaux in his answer declares he has no objection to the partition, but avers that the minor Amanda Berluchaux is not legally represented and was not so at the making of the inventory, as no tutor can be appointed to her in this state while she is under the guardianship of her mother; he prays that the appointment of the tutor to said minor be declared null and void; and that no further proceedings be had in the matter until she is duly represented.

The testamentary executor amended his answer and alleged the insufficiency of the appointment of a tutor to represent the minor, Amanda Berluchaux, and the nullity of all the proceedings under it. He stated also, that the mother of said minor, in her capacity of natural tutrix, had sent a power of

attorney to the tutor authorising him to act in her name and behalf in all matters concerning the succession falling to the heirs,but there is no evidence or authority accompanying said act to show she was authorised to act as tutrix of her daughter. He prays that a new appointment be made and the matter proceeded in *de novo*.

A power of attorney from the mother in her capacity as tutrix of her minor, to the uncle who was appointed here, was produced duly certified, empowering said dative tutor to act in all matters touching the partition of the property.

The plaintiff took a rule on the dative tutor, to show cause why he should not give bond and security according to law, and proceed in his said capacity to make the partition required.

The judge of probates decided that although by the 268th article of the *La. Code*, the surviving wife is of right entitled to the tutorship of her minor children, yet according to article 271, she cannot be compelled to accept, and when she does, she is required to comply with certain formalities.

2. That in the present case it is not shown that the mother, residing under the government of Spain, has complied with any of the formalities required by law, to authorise her to act as tutrix; and that her assuming that quality in the power of attorney is not sufficient.

3. According to the article 946 of the *Code of Practice*, in case of absence from the state of the parent and minor, a tutor can be appointed to the latter, to assert and defend her interests. See *also* 3 *La. Rep:* 484.

4. In the present J. Chaigneau, the uncle of said minor. has, with the advice of a family meeting, been appointed tutor by this court, and as such, is bound to qualify and give security as the law requires in such cases. The rule was made absolute.

The tutor appealed.

Soulé for the the tutor and appellant, contended that the appointment of the tutor in this case to represent the minor, Amanda Berluchaux, is illegal and void, as said minor resides

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with her mother who is entitled to the guardianship and to be tutrix of her child.

2. The appointment of tutor being null, all the proceedings in taking the inventory preparatory to the partition, are illegal and void.

3 The power of attorney transmitted by the mother of said minor from Cuba, although it purports to be made in her capacity of tutrix, and authorises the tutor appointed here to act in all matters in behalf of the minor, concerning the succession inherited, is not accompanied by any authority showing said tutrix has been regularly appointed and confirmed in said office, and is therefore without effect.

Roselius for the plaintiff and appellee. There are two questions to be decided.

1. Can a dative tutor be legally appointed to a minor, residing with her mother under the government of Spain, when called to inherit property here, and to assist in a partition thereof?

2. Or, can the absent mother, while abroad, represent her minor as natural tutrix, without showing she has complied with the formalities of the law of her domicil, in being appointed and confirmed to said office?

3. We contend for the affirmative of these questions. By the positive provisions of our law and by the expositions thereof by this court, a dative tutor must be appointed to represent the absent minor, when inheriting property in this state. *La. Code, art.* 1092. *Code of Practice,* 959. 3 *La. Rep.* 484.

4. It will be also seen by those laws, that a curator or tutor *ad bona* cannot be legally appointed in this case. The tutor already appointed must act and proceed in the partition.

Mathews, J., delivered the opinion of the court.

This is a suit instituted to obtain a partition of certain property situated within the jurisdiction of the court below, which property cannot be divided and partaken in kind, and must consequently be subjected to a sale by licitation, &c.

A difficulty occurred in proceeding to partition, in the manner above stated, in consequence of one of the co-heirs or co-proprietors being a minor, residing out of the state and unrepresented in it. This minor, Amanda Berluchaux, resides with her mother, in St. Jago de Cuba, a place under the government of the laws of Spain. The mother being the surviving parent, according to our law, is natural tutrix, and as such has a right to the guardianship of her children and to assume the management and administration of their property; but she is not bound to accept of this office. Although she may refuse it, still she retains the superintendence of them and the care of their education. A tutor whom she may have caused to be appointed, on her refusal to take that office, in such a case, is merely entrusted with what concerns the administration of their property. *La. Code, art.* 268 *and* 271.

The mother or surviving parent as tutor or tutrix may refuse the administration of her minor children's property, yet retain the superintendence of them and the care of their education.

The person appointed to manage and administer minors' property, on the refusal of the natural tutrix to take that office, is termed a tutor *ad bona;* and this appointment may be made to minors, of a person other than the natural tutrix, even when she is present and residing in the state.

In pursuance of these provisions of law, it is evident that a tutor *ad bona* may be appointed to a minor, other than the natural tutrix, even when she is present and residing in the state. A mother residing in a foreign state or country with her children, who inherit property in this, on coming here and making application to the proper authority for that purpose, would be preferred to all others in obtaining the administration of the property thus inherited; or, perhaps, on proof to the tribunal of this state, in a case like the present, which relates only to the partition of a succession held in common with others by her minor child, that she had taken all steps necessary to give her full authority as tutrix, in relation to the property of her pupil, according to the laws of the place of their residence, she might appoint an attorney in fact, to represent their interests here; but no proof of this nature is adduced in the present instance.

A mother residing in a foreign state or country, with her minor children who inherit property in this, on coming here would be preferred to all others, in obtaining the administration of their inheritance.

Where a surviving parent resides in a foreign state or country, with his children who inherit property in this, he could, perhaps, on proof that he had complied with the laws of the country where he re-

We have said that the minor who is interested in the partition of property, claimed in the present case, resides with her mother in a place governed by Spanish law. Now, although that law has no longer any force in the state of Louisiana, since the repealing act of 1828, yet having been considered previously the law of this country, so far as it was not abrogated or altered by our statutory enactments, we may still,

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sided, and had obtained full authority as tutor, to administer his wards' property, appoint an attorney in fact to represent their interests at least so far as to make partition of a succession, held in common with co-heirs residing here.

The Spanish law having been in force in Louisian, until the repealing act of 1828, the court will recognise it in relation to cases arising under the government of Spain, without requiring it to be proved as a fact.

According to the Spanish law, the tutorship of the mother is required to be conferred and confirmed by the judge, in the same manner as of any other near relation on whom the office is cast by law.

The father may confer the tutorship of his legitimate children by will, which supersedes any appointment by the judge.

It is the duty of the relations of a minor, residing in this state, to provoke the appointment of a

without violation of the rule which requires foreign laws to be proved as facts, assume some knowledge of it. According to this law tutorship is of three kinds only: Testamentary, by effect of law, or *legitima* and dative. The right of tutorship granted to a mother comes under the denomination of *tutela legitima*, and she is to be preferred in the order of relationship before all others, when the father has not provided by will a tutor for his children. *Febrero Novisimo, vol.* 1, *Nos.* 7 *and* 10. Thus the tutorship conferred on a mother by this law is granted in the same manner as that which is given to the nearest relation, and it is made the duty of the judge to confer and confirm the tutorship of a mother as of any other near relation, on whom the office is thrown by law, and tutors of this class can do no act, without this confirmation, which will be valid in relation to the administration of the property of their pupils, unless when the tutorship is conferred by the testament of a father on his legitimate children. *Same authority, No* 15.

The attempt therefore of the mother, in the present instance to appoint an attorney in fact, to act for her in relation to the interests of her daughter, must be considered as without effect; because there is no evidence of confirmation of the tutorship of the former by any competent tribunal in the place where they reside.

Considering the minor as wholly unrepresented in this state in relation to the administration of her property, the next inquiry is how this defect is to be supplied in pursuance of our laws on the subject. It is admitted on both sides, that a tutor must be appointed by authority of the competent judge, and one was appointed under all the formalities required to constitute a dative tutor *ad bona*. This appointment is complained of as illegal; and in opposition to it, the counsel contends that a tutor *ad hoc* only could be appointed according to the provisions of the 295th article of the La. Code. That article is found in the section which treats of dative tutorship, and has relation to minors, both those who may have no domicil in the state and those who have. It is, however, made the duty of the relations of the minor, residing

in the state, to provoke the appointment of a tutor, whether such minor be or be not domiciliated therein. In the present instance the appointment of a tutor *ad bona* has been provoked, and we are of opinion that this appointment is supported by the art. 1092 of the La. Code, and art. 946 of the Code of Practice. Consequently there is no necessity of appointing a tutor *ad hoc*.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

tutor, whether the minor be or be not domiciliated therein.

Where a minor resides in a foreign country, and inherits property in this state, a tutor *ad bona* must be appointed to make partition or administer it.

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ON A PETITION FOR A RE-HEARING.

It is a general principle, admitted by the comity of nations, that the tutor, of a minor, deriving his authority from the law of their common domicil, has a right to exercise the actions of his pupil every where.

The *law* 9, *tit*, 16, *Partida* 6, adopts the system of the Roman law in the 118th novel of Justinian, requiring the mother who accepts the tutorship of her children, other than that conferred by testament, to give security.

This case comes before the court, in this instance, on an application for a re-hearing. *See the decision of the case, ante* 539.

Soulé, for the tutor and appellant, applied for a re-hearing, on the following grounds:

1. In this case the minor to whom a tutor has been appointed, resides with her mother, in the dominions of Spain, where natural tutorship is governed by the same principles as those which prevail in Louisiana.

2. By our laws, the tutorship of minor children belongs of right to the surviving parent, as *natural tutor*; it takes place

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as a matter of right, without being confirmed by the judge. *La. Code, art.* 265, 268.

3. A minor having a mother living, cannot be subject, as regards his person and property, to the power and authority of any other person than that of her mother, unless she has been deprived of her right of tutorship, or has expressly renounced it.

4. In the present case, the appointment of a permanent and unqualified tutor, has the effect to deprive the mother of the tutorship; if his functions are only temporary and limited to the particular object for which they were conferred, it is only a *special* tutorship, which may exist simultaneously with natural tutorship.

5. The court seems to recognise in its decree, that the mother, on coming here, could claim the tutorship, which is admitting it to be special as conferred here, and which the court has thought proper to qualify, by terming him tutor *ad bona.*

6. Our jurisprudence, modified as it is by the act of 1830, no longer recognises even curators *ad bona:* that law has respected curators *ad hoc* and tutors *ad hoc*, but it has introduced nothing in our system that might apprise us of a tutor *ad bona.* Such a tutor is unknown to our jurisprudence.

7. Any tutorship, other than that which must exist in all cases over the minor, is essentially special and limited to the the particular case that gave rise to it, and in the strictest sense is a tutorship *ad hoc.*

8. The principle is generally recognised, that the authority of the tutor cannot extend and be exercised beyond the limits of the country of his appointment, except as regards the personal rights of the minor; but the law of the place where it is situated must govern in regard to immoveable property.

9. It is true the code provides that a tutor, *conformably to law,* shall be appointed to the absent minor, when the father and mother reside out of the state, and when an inheritance is to be administered. *La. Code*, 1092.

10. The text of this article points out a direct reference to other provisions, and by recurring to article 295, we see what

kind of tutor must be appointed in the present case. But one absolute tutor can exist; all others are special, as tutors *ad hoc*.

11. In France, a *pro-tutor* is appointed whenever a minor has property situated elsewhere than in the country of his domicil. *Merlin, Toullier, Sirey, Duranton, Paillet*, all recognise in the functions of this pro-tutor, those of a *special* one. By the Roman law, a special tutor was appointed to represent the minor in particular cases, when his absolute tutor could not act.

12. In this case the appointment of tutor is only special. Who could dispute the mother's right, when duly recognised as tutrix, according to the laws of Spain, to come here and claim the personal rights and actions of her minor daughter, or the proceeds of the property sold here? As soon as she has complied with the formalities of our laws, she can sue and recover in the name of her minor child, the debts due to her in this state, which will render the tutor's functions ineffectual or purely temporary and special.

Bullard, J., delivered the opinion of the court.

The court has given to the petition for a re-hearing in this case, a deliberate consideration, and now proceeds to state the reasons why its first judgment should not be disturbed.

It is a general principle admitted by the comity of nations, that the tutor of a minor, deriving his authority from the law of their common domicil, has a right to exercise the actions of his pupil every where.

We do not hesitate to avow that our first impressions were strongly in accordance with the views of the counsel for the appellant. It seems well settled, and the principle is not controverted by this court, that the tutor of a minor deriving his authority from the law of their common domicil, has a right to exercise the actions of his pupil every where. The comity of nations recognises the validity of such an authority. Such is the doctrine taught by most of the continental writers, cited by Judge Story, in his work on the Conflict of Laws, to which our attention has been called, and which we often consult with pleasure and with profit. The first question, therefore, which presents itself, is one of fact: has Amanda Berluchaux a tutor, recognised as such by the laws of Spain? If so, she may be properly represented by him in the action

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of partition now pending. In deciding on this question, we thought ourselves authorised to proceed upon that knowledge of the laws of Spain, which we derive from the fact that Louisiana was long governed by the same system, as was done in two cases reported in 1 *La. Rep.* 255 *and* 542.

The counsel assumes as a fact, that natural tutorship is governed in Spain by the same principles as those adopted in this state, that it takes place of right, without the necessity of being confirmed, and that those same principles are recognised by the Spanish as well as Roman jurisprudence.

This confident assertion has induced us to examine again those parts of the Spanish law which relate to this subject, lest we may have been mistaken in supposing, as we did in the opinion first pronounced, that the tutorship conferred on the mother is merely legal, and requires an express judicial recognition and confirmation. In the result of this second investigation we think we cannot be mistaken. It is incontestible, that the mother's right to the tutorship of her children was unknown to the jurisprudence of Rome, until the promulgation of the 118th novel of Justinian. The tutorship is conferred on her by that novel, as the nearest relation, when the father has appointed no tutor, by will, but always under the express condition that she shall renounce the right of contracting a second marriage, and the benefit of the *senatus consultum velleinanim.* On making these renunciations, she shall be preferred, says the novel, to all the collaterals, except the tutor appointed by the testament of the father. 118*th Novel, chap.* 5.

The *law* 9, *tit.* 16, *Partida* 6, adopts the system of the Roman law, in the 118th Novel of Justinian, requiring the mother who accepts the tutorship of her children, other than that conferred by testament, to give security.

The 9*th law,* 16*th title of the* 6*th Partida,* adopted the system of the novel, and requires the mother who accepts the tutorship of her children, other than that conferred by the testament of the father, to give security. In addition to the authorities referred to in our first opinion, to establish the character and requisites of this species of tutorship, we might rely on the opinion of *Gomez, in Legis Tauri,* 14*th law, No.* 10, *et seq.*

Febrero, whose authority will hardly be questioned, so far from regarding the tutorship of the mother as natural, in our legal sense of the term, treats it expressly as anomalous, irregular and extraordinary. 1 *Feb. Novisimo*, 148, *No.* 11.

With such views of the laws of Spain, we thought that the execution of a power of attorney, before the American consul at St Jago de Cuba, by the mother, assuming the quality of guardian or tutrix to her minor children, did not alone furnish sufficient evidence of her capacity as such.

That question being disposed of, it only remains to inquire whether the most proper appointment to be made by the court, was of a tutor *ad bona*, generally, or a tutor *ad hoc*. On this subject, the counsel is pleased to remark that, "our jurisprudence, modified as it has been by the law of 1830, recognises no more curators *ad bona*; that law has respected curators *ad hoc*, tutors *ad hoc*, but it has introduced nothing in our system of laws, that might apprise us of the existence of a tutor *ad bona*. Such a tutor is unknown to any jurisprudence."

The court is not sensible of meriting the compliment of having enriched our jurisprudence with a new principle, or our legal language with a new term. Neither the thing nor the name is original with the court. *The Code of Practice, article* 946 provides that "if the father and mother of the minor reside out of the state, and are not represented in it, and the minor be also absent, he may be provided with a tutor, by the judge of probates of the place where his principal property is, or where he has interests to assert or defend." It is true, the tutor in such a case, is not expressly called tutor *ad bona*, but it is clear the tutorship is limited, and cannot extend to the person of the pupil, because he is presumed to be under the paternal power, and the duties of such a tutor are confined, necessarily, to the property and interests of the minor. Perhaps a better translation could not be made into Latin, than to say at once, without paraphrase, he would be a tutor *ad bona*. By the 271st article of the Civil Code, it is declared that when the mother refuses the tutorship, she still retains the superintendence of her chil-

dren, and the care of their education. The tutor, in such a case, is merely entrusted with what concerns the administration of their property. This is, most emphatically, a tutorship *ad bona*, although not so expressed. But the article 1092 of the La. Code, speaks pointedly of tutors and curators *ad bona*.

In short, it appears to us to result from all the provisions of our law, on this subject, that the legislature intended to provide more ample guards and guarantees for the protection of the interests of absent minors, than could be expected from the mere appointment of a nominal tutor *ad hoc*, in a particular suit, whose duties would necessarily terminate with the suit, and who, in this particular case, would be, perhaps, without authority to receive the share coming to the minor, after the partition should have been effected, and who gives no security for the delivery of it to the party interested. It is true, these provisions do not prevent persons having claims against a minor or absent person, from pursuing the same, previous to the appointment of a tutor or curator; but in such cases, the absentee may be represented in the suit by a curator or tutor *ad hoc*. *Code of Practice, art* 964. It is, however, the duty of the relations of a minor, to provoke the appointment of a tutor, either with full power, as such, over the person and property, or in a more restricted sense of the word, but always under some alternate legal responsibility towards his pupil.

The re-hearing, for these reasons, is refused.

GARRITSON *vs.* HIS CREDITORS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

In an absolute or defeasible sale, the property does not pass from the vendor with regard to third persons, until tradition takes place; but before the tradition the vendee has *jus ad rem*, though not *in re*.

So where a bill of sale is taken on a steam-boat, to secure the payment of a sum of money, executed between the parties in the state of Tennessee, and registered in a court there, and the boat is afterwards brought to this state, and sold by the syndic of the creditors of the owner, who becomes insolvent: *Held*, that the bill of sale is valid although defeasible, on payment of the money; and that the sale by the syndic changed the remedy, without affecting the vendee's right, who is still entitled to the proceeds.

On the 2d March, 1831, the plaintiff made a surrender of his property to his creditors, which was accepted, and J. Leeds appointed syndic. Among the articles surrendered, was the steam-boat Red Rover, valued in the schedule at six thousand dollars.

After selling the property surrendered, the syndic filed a tableau of distribution on the 26th March, 1826.

On the 2d April following, Joseph Hurst, a judgment creditor of the insolvent, for materials furnished and labor done, on the steamer Red Rover in Tennessee, before she made her voyage to New-Orleans, amounting to six hundred and sixty-three dollars, made opposition to the tableau, and claimed to be put on it as a privileged creditor, on the proceeds of the steam-boat. His judgment was obtained on an attachment against the boat, after her arrival in this state, which was duly recorded.

On the 6th of April, Baxter & Hicks filed their petition to the tableau, alleging various grounds of opposition, on the score of informalities &c. in it; and also claimed to be

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placed thereon as privileged creditors, on the proceeds of said steam-boat, for near three thousand dollars.

The petitioners annexed to their opposition a bill of sale, executed by the insolvent to them, in the state of Tennessee, where the steam-boat was built. It was recorded in the county court of one of the counties in that state, and stipulated a sale of the steam-boat to the vendees, but defeasible on the payment of the sum mentioned therein, conditioned also that the boat should not leave the state, until the money was paid.

Leeds, the syndic, was also placed on the tableau as a creditor, for six hundred and sixteen dollars and seventy-three cents, for boilers, castings, &c., furnished said boat.

On the final hearing of these oppositions, the claims were allowed respectively, but Baxter & Hicks were ordered to be placed on the tableau, and be paid in preference to Leeds and Hurst. They appealed.

Lockett and M'Caleb, for the appellants, contended that the judgment should be reversed, because the mortgage under which Baxter & Hicks claim the preference over other creditors, was never recorded, at least there is no proof of it, and if it had been, it could only have effect against third persons, from the date of its registry.

2. The mortgage being the only ground on which the preference was given to Baxter & Hicks, and this it seems is evidently insufficient, the decision of the District Court is therefore clearly erroneous, and must be reversed.

Hennen, for Baxter & Hicks, the appellees, made the following points.

1. We claim a privilege on the proceeds, under a bill of sale of the steam-boat, which was duly recorded and enregistered in one of the courts in Tennessee, where the boat then was, and where she was to remain, until the contract between the parties was fulfilled.

This bill of sale is absolute, but with the condition that if the *sum due* Baxter & Hicks should be paid, then a re-

conveyance would be made. This deed was not required to be registered in Louisiana, as the boat was to remain in Tennessee. It was a fraud in bringing her away.

3. Baxter & Hicks had commenced suit, and were proceeding to judgment, when Garritson surrendered his property. They could have enforced their rights against the boat, in virtue of their mortgage, if they had not been compelled to cumulate their suit with the *concurso* of creditors. They have now a privilege on the proceeds of the sale of the boat.

Martin, J., delivered the opinion of the court.

The syndic is appellant from a judgment, by which he is ordered to pay to an intervening party, the proceeds of the sale of a steam-boat, part of the property surrendered by the insolvent.

The judgment is complained of, on the ground that the mortgage under which a privilege is claimed, was never recorded, and if it had been it could have no effect against third persons, except from the date of the registry.

The counsel of the appellee urges, they claim under a bill of sale of the boat, the proceeds of the sale of which are now in the hands of the appellant. The bill of sale appears to have been registered in a court of the state of Tennessee, within the jurisdiction of which the sale was made, and the boat was to remain in that state, by the terms of the contract. The sale is indeed defeasible on the payment of a sum of money. The insolvent was guilty of fraud in taking the boat, in violation of his contract, out of the state of Tennessee, and bringing her to New-Orleans.

It does not appear to us, that the instrument under which the proceeds of the boat are claimed, had any other object than to secure the payment of a sum of money; but the parties chose to give to their contract the form of a defeasible sale, and we cannot consider it in any other light. It is true that in an absolute or defeasible sale, the property does not pass from the vendor, with regard to third parties, till tradition takes place. *Traditionibus non nudis pactis dominia*

In an absolute or defeasible sale, the property does not pass from the vendor with regard to third persons, until tradition takes place; but before the tradition, the vendee has *jus ad rem* though not *in re*.

So where a bill of sale is taken on a steam-boat, to secure the payment of a sum of money, executed between the parties in the state of Tennessee, and registered in a court there, and the boat is afterwards brought to this state, and sold by the syndic of the creditors of the own-

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er who becomes insolvent: *Held*, that the bill of sale is valid, although defeasible on payment of the money; and that the sale by the syndic changed the remedy, without affecting the vendee's right, who is still entitled to the proceeds.

rerum transferentur. But before tradition the vendee has *jus ad rem*, though not *in re.* This right the vendee began to exercise by a suit against the insolvent, before the cession, which was cumulated with the proceedings in the *concurso.* The plaintiff, if his suit had been suffered to be proceeded in to judgment, must have recovered the boat *rem ipsam.*

The sale by the syndic has changed the *remedy*, without affecting the *right.* Since the boat cannot now be recovered, the plaintiff was entitled to what represents her, *i. e.*, the proceeds of the sale, and we do not think the District Court erred in decreeing them to be paid to him.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

TRUDEAU *vs.* MATHER.

APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

In an action of mortgage based on an account and debt, which is shown to be grossly erroneous in its calculations and amount, the debt will be set aside for adjustment, and the contract of mortgage annulled and cancelled as being made in error.

This is an action of mortgage, to compel the payment of three thousand two hundred dollars, due as the first instalment of a debt of nineteen thousand four hundred and fifty dollars, acknowledged by the defendant.

The plaintiff alleges, that the above sum is the amount found due on a settlement between him and the defendant, as his curator *ad bona*, payable by instalments of three thousand two hundred dollars each, and secured by a special mortgage

on a valuable tract of land in East Baton Rouge. The first instalment having become due and remaining unpaid, he prays judgment for the amount, and that the mortgaged premises be seized and sold to satisfy the same.

The defendant denies that he is indebted in the manner and form, or to the amount as alleged, and avers the contract or settlement of account between them, was made through error of law and fact, and should be annulled; and the mortgage being merely accessory to the debt, is null and void, and ought to be cancelled. He further states, that his account as curator *ad bona*, was agreed to be referred to a person versed in such matters, and stated according to law; that in stating it, he is illegally charged with interest upon interest, at ten per cent. per annum, which charges are about eleven thousand six hundred and forty-five dollars more than is really due: and that he signed said account through error, supposing it to be correct at the time; he therefore prays that the act of settlement or the contract, and mortgage sued on, be declared null and void.

The act of settlement, as well as that of the mortgage, were introduced in evidence, and the testimony of the notary who drew up the acts and stated the account, was taken down. From this testimony, and the bare inspection of the account, the district judge who tried the case, detected the illegal items and charges, substantially as alleged.

Judgment was rendered, declaring the account as stated, and the mortgage executed by the defendant, null and void; reserving to the plaintiff his legal rights against the defendant, as his curator *ad bona*, on a legal and just settlement of their accounts. The plaintiff appealed.

Nicholls, for the plaintiff, contended that the error alleged was not proved, as appeared by the testimony of the notary who drew up the act of settlement. But if error had been proved, it should have been corrected by the court, and judgment given for the sum actually due.

2. The manner of calculating interest was not illegal; it was calculated by the appellee himself, who agreed to pay at that rate.

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3. The account stated and drawn up by the notary, must be considered in law, as made by the defendant, whose agent he was. *Qui facit per alium, facit per se.*

4. He who seeks justice, says the judge *a quo*, must himself be just. The court applied this maxim, exclusively for the benefit of the defendant, in correcting the errors to his disadvantage, if any existed, and refuses to allow the plaintiff that which is acknowledged to be due. In this respect also the judgment is erroneous.

5. The rendition of the account being followed by a solemn notarial act, is binding on the defendant, to pay the interest stipulated therein.

6. The District Court erred in vacating the act of mortgage, given as security for this claim, as the plaintiff relinquished a better security, which should not be affected by an error of calculation in the account.

7. The notarial act of settlement was in the nature of a compromise, by which the plaintiff relinquished one thousand dollars, as admitted since by the defendant.

Conrad, for the defendant, showed there was gross error in the settlement of accounts, which requires the defendant to pay more than twice as much as was actually due. It cannot be presumed he intended to benefit the plaintiff that amount. *Nemo presumitur donare.*

2. The defendant must have supposed he was bound to pay compound interest, at the rate of ten per cent. per annum, or he would not have signed; in that case it is an error of law, bearing on an essential part of the agreement, and is null. *La. Code*, 1840.

3. It was an error of calculation or ignorance of the fact, that compound interest was charged. Error in this respect vitiates the contract. *La. Code*, 1815.

4. This is a case clearly of exorbitant usury. Not only is a higher rate of interest charged than the curator was bound to pay, but interest on that interest is charged, all of which is prohibited. *Civil Code, p.* 70, *art.* 71. *La. Code, art.* 1934.

J. Seghers, on the same side, contended, that the contract was manifestly erroneous, and null and void. Tutors were not bound under the old Code, which must govern in this case, to pay compound interest. Under the *La. Code*, tutors are only bound to pay an interest of five per cent. on the revenues, when they exceed five hundred dollars, after deducting ten per cent. for commissions. *La. Code*, 341–2. 1 *Moreau's Digest*, 225. 5 *La. Reports*, 489, 490.

2. The agreement entered into between the parties, took place under the La. Code, which prohibits interest on interest to be taken, and no stipulation to that effect is valid. *La. Code*, 1934.

3. The defendant was laboring under an error of fact and of law, from which he should be relieved. *La. Code, art.* 1815–16, 1840, 2129.

4. Error in law vitiates a contract, when such error is its only or principal cause. *La. Code*, 1840. 5 *Toullier, l'Erreur de Droit, No.* 58 *et suivans.*

Mathews, J., delivered the opinion of the court.

This suit is based on a contract of mortgage, wherein the defendant acknowledges to owe to the plaintiff, the sum of nineteen thousand four hundred and fifty dollars eighty-five cents, which he promised to pay by annual instalments of three thousand two hundred and fifty dollars, seventeen cents. The debt purports to have arisen in consequence of the acts of the defendant, as curator *ad bona* of the plaintiff, and was stated to the amount stipulated in the act of mortgage, as a result of calculations of interest on certain sums of money which came into the hands of the curator. These calculations originated in a settlement of accounts between him and his ward, after the latter arrived at the age of majority, and were made by a person to whom the accounts had been submitted for adjustment, by the curator. The court below considering the calculations made by the referee, as grossly erroneous, and prejudicial to the defendant to a very large amount, rendered judgment in his favor, by which the account as adjusted, was set aside, and the contract of mortgage,

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In an action of mortgage based on an account and debt, which is shown to be grossly erroneous in its calculations and amount, the debt will be set aside for adjustment, and the contract of mortgage annulled as being made in error.

a sequence of it, was annulled; and from this the plaintiff appealed.

The calculations of the referee are shown by the evidence of the case, to be illegal and erroneous, both in relation to the rate of interest assumed, and the manner in which it was compounded for a number of years, producing a result egregiously wrong, and prejudicial to the defendant, probably to more than one half of the sum stated against him.

The error complained of in this transaction, is so evident and so gross, as in our opinion, clearly to authorise the judgment of the court below. That court might perhaps, after setting aside the account rendered, and annulling the act of mortgage, have proceeded to adjust the accounts of the curator, and rendered judgment for the sum which should appear to be justly due to the plaintiff. But the pleadings of the case do not require a proceeding of this kind, consequently, not having taken this step, is no ground of error in the judgment as pronounced.

The parties may hereafter adjust their differences amicably, or if this cannot be effected, the courts of justice remain open to the plaintiff, in which he may prosecute his claim.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

SAULET *vs.* GIRARD.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF JEFFERSON.

The act of the 11th March, 1830, abolishing the office of curator *ad bona et ad litem* to minors, does not apply in cases where curators were appointed before the promulgation of the act. If the first curator is removed, another must be appointed, although since the general law abolishing the office.

The plaintiff having been appointed curator *ad bona* to the minors Foucher, applied to the Court of Probates, to be discharged, and that a tutor and under tutor be appointed to said minors.

It appeared by a statement of facts admitted, that A. Foucher, jr., was appointed curator *ad bona* of the minors Foucher, the 26th January, 1830, and regularly removed from said office, in December, 1834, and the plaintiff nominated as curator *ad bona* in his place.

The judge of probates decided, that Foucher having been appointed before the passage of the act of the 11th March, 1830, abolishing the office of curators to minors, by the proviso in the 9th section of said act, that law is not applicable to a case like the present. Judgment was rendered, maintaining the plaintiff in his appointment, from which he appealed.

Pichot, for the plaintiff, contended, that the judgment of the Probate Court was erroneous, because by the 9th section of the act of the 11th March, 1830, there shall hereafter be no curator *ad bona* or *ad litis* appointed to minors.

2. That although by the proviso in the 9th section of said act, this law shall not apply to cases, in which curators *ad bona* shall have been appointed previous to its promulgation, yet this proviso cannot be so construed, as to suppose that

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curators may be now appointed, but that only those in office at the time, were to be maintained until it became vacant.

3. The legislature having in 1828 passed a law, that minors should remain under the authority of their tutors, until they obtained the age of majority, it became necessary to abolish the office of curator *ad bona* and *ad litis*, to make the system harmonise with the civil law, the office therefore no longer exists, since 1830.

4. By reference to the articles of the Code which treat of tutorship and curatorship, it will be seen that the alteration was made in the law, for the greater security of minors; so that in this case, the minors Foucher should have the benefit of it.

Rost, contra.

Bullard, J., delivered the opinion of the court.

The statement of facts in this case, shows that A. Foucher, jr. was regularly appointed curator *ad bona* of his minor children, before the promulgation of the act of the 11th March, 1830, entitled "an act in addition to the laws now in force, relative to tutors and curators of minors;" that in December, 1834, he was regularly deprived of the curatorship, and that François Saulet was thenceforth appointed curator *ad bona* of the children, in the manner and form required by law for the appointment of such curators, before the passage of that act. The question therefore which the case presents, is whether this last appointment was regular and legal.

The act of the 11th March, 1830, abolishing the office of curator, *ad bona* and *ad litem* to minors, does not apply in cases where curators were appointed before the promulgation of the act. If the first curator is removed, another must be appointed, although since the general law abolishing the office.

The 9th section of the act declares, that there shall hereafter be no curator *ad bona* or curator *ad litem* appointed in any case, but that the persons and estates of minors shall in all cases, be placed under the power of tutors and undertutors, &c. The proviso to this section, out of which the controversy has arisen, is in the following words: "provided that this section shall not apply to cases, in which curators *ad bona* shall have been appointed, before the promulgation of this act."

This proviso applies to the whole section; as well to that part, which abolishes the trust of curator *ad bona*, as to that which provides for the appointment of tutors and under tutors. Surely then it cannot be said that this statute authorises the appointment of a tutor to minors, who were already provided with curators *ad bona*, before its promulgation. If the section stood without the proviso, then indeed it would authorise the appointment of a tutor and under tutor, in this case. The construction contended for by the appellant, would leave the proviso without effect. But we are bound, if possible, to give it some effect, if susceptible of it. This can only be done by supposing that the legislature intended that such minors, as were at the promulgation of the act provided with curators *ad bona*, should continue under that species of guardianship until their age of majority, and that the change of system should not apply to them. With respect to them, the trust of curator *ad bona*, as established by the Code, still exists, because it is declared that as to their case, this section shall not apply. As to them, we are therefore bound to consider it as unwritten, for it appears to us clear, that it does not authorise the appointment of a tutor and under tutor. We are, therefore, of opinion, that the Probate Court did not err in maintaining the appointment of a curator *ad bona*.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

FAGOT ET ALS. *vs.* PORCHE.

APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Evidence of a claim in compensation and re-convention, will be rejected, when the demand is not equally liquidated with the claim of the plaintiff.

The liquidation of a partnership claim, cannot be pleaded in compensation or re-convention, against a demand on a note of hand.

The absence of all connection between two demands, is an insurmountable objection and obstacle to a demand in compensation or re-convention.

This is an action on two promissory notes, executed by the defendant in favor of Pierre Caseaux, deceased, the ancestor of the plaintiffs. Fagot sues as tutor of his children, who are minor heirs of the deceased, claiming the amount of said notes, which together make the sum of five hundred and twenty dollars ninety-one cents; that one of them, for four hundred and thirty-two dollars ninety-one cents, is secured by a mortgage on a slave, which he prays may be seized and sold to pay said sum.

The defendant pleaded a general denial, and set up a large claim, amounting to one thousand seven hundred and twenty-two dollars, in re-convention against the plaintiffs, as due by their ancestor, for the purchase, advances and increased value of a plantation, which he alleges he owned in partnership with the said P. Caseaux, in his life-time, and which his said heirs, the plaintiffs, have caused to be sold as a part of his succession.

On the trial, the district judge rejected the testimony of the defendant, offered in support of his re-conventional demand, on the ground that the claim was not liquidated, and was not connected with, or incidental to the demand of the plaintiffs. The defendant's counsel excepted to the opinion of the court, rejecting the evidence.

Judgment was given in favor of the plaintiffs, for the amount of their claim. The defendant appealed.

Nicholls, for the appellant, insisted the court erred, in rejecting testimony to establish the plea in compensation. Compensation takes place of right between two debts, having for their object a sum of money, and equally liquidated and demandable. *La. Code*, 2205.

2. To establish this right of compensation, it is necessary to show, first, that the claim is for a sum of money; second, that it be equally liquidated with the one to which it is opposed, and third, that it be equally demandable.

3. The document offered as testimony to support the plea, is an account rendered by the ancestor of the plaintiffs, to whom the notes sued on were given, in which he acknowledges the plantation to be partnership property, debits defendant with the amount of the purchase money, expenses of the crop, negro hire, and strikes a balance in his own favor. The account is signed by both parties, and is an acknowledgment on the part of Caseaux that half of the plantation is the property of the defendant.

4. Under these circumstances, the latter is entitled to the money he has paid, as the heirs have had the plantation sold. This then, is a claim for a *sum of money* due, which establishes the first part of the plea in compensation.

5. The claim is equally liquidated, for the sum claimed on account of the plantation is specified in the account offered in evidence.

The claim of the defendant is equally demandable with that sued on. The interest in the plantation belonging to the defendant, has been received by the plaintiffs, in having it sold as part of the succession of their ancestor. The sum due for this interest, is specified in the account offered in evidence, and more than compensating the sum sued for.

Martin, J., delivered the opinion of the court.

The defendant being sued on two promissory notes, executed in favor of the ancestor of the plaintiffs, pleaded

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the general issue, and set up a claim in compensation and re-convention, for a much larger sum than that for which the notes sued on were given. Judgment was rendered in favor of the plaintiffs, and disregarding the defendant's claim, from which he appealed.

His counsel complains in this court, that the judge *a quo*, rejected written and parole evidence offered by him, in support of the claims pleaded in compensation and re-convention. These claims were grounded on the allegation, that the plaintiffs' ancestor, and who was the payee of the notes sued on, took in his own name, the title to the plantation which he and the defendant had bought in partnership, and the defendant advanced a large sum towards the purchase, and made great advances for the cultivation and improvement of the land; that at the death of the plaintiffs' ancestor, his heirs possessed themselves of the land, which has since been sold as part of the succession. The defendant also avers, he has a further and large claim, on the score of the increased value of the land since the purchase.

Evidence of a claim in compensation and re-convention will be rejected, when the demand is not equally liquidated with the claim of the plaintiff.

The introduction of the evidence was rejected, on the ground that the defendant's claim was not equally liquidated with that of the plaintiffs, and was absolutely unconnected therewith.

The liquidation of a partnership claim, cannot be pleaded in compensation or re-convention, against a demand on a note of hand.

It appears to us, the decision of the District Court was correct. The liquidation of a partnership concern, such as that now sought, is universally a much more tedious operation, than that which is required to ascertain the validity of a claim of the payee of a note of hand. The liquidation of the claim of the defendant, could not well be asked from a plaintiff, whose claim was already liquidated by the defendant, before he subscribed the note. There was no room for compensation.

The absence of all connection between two demands, is an insurmountable objection and obstacle to a demand in compensation and re-convention.

The absence of all kind of connection between two claims, is an insurmountable obstacle to a demand in compensation or re-convention.

The plea of re-convention is unsupported.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

HILLIGSBERG *vs.* HOLMES.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

The defendant, in an execution, is subject to no interest, simple or compound, after the adjudication of his property, whether on credit or for cash.

In a sale of property, under execution, on twelve month's credit, the purchaser is required to give bond for the whole amount of principal, interest and costs due on the day of sale, as if made for cash; and on that aggregate sum, the same rate of interest is allowed in the bond, as that on the original debt, from the day of sale.

When the judgment of the court *a qua* is amended, on appeal, although both parties asked and obtained an alteration, the appellee will be required to pay costs in both courts.

The plaintiff alleges that he sold a lot of ground, in the city of New-Orleans, on the first of November, 1828, to one P. S. Hamblet, for two thousand, one hundred dollars, payable by instalments of seven hundred dollars each, in one, two and three years from the date of the sale, with interest at the rate of ten per cent. per annum, from the times when said notes respectively became due, if not punctually paid, until final payment, together with a mortgage retained on the property, to secure the payment of the price thereof.

The two last notes being unpaid after becoming due, and the purchaser having died in the mean time, but leaving an heir, the plaintiff obtained an order of seizure and sale of the lot in question, and I. T. Preston, Esq. was appointed curator *ad hoc*, to the heir who resided out of the state, and as a defensor to the suit.

At the sale of the property, on the 18th of October, 1834, Newland Holmes became the purchaser, as the last and highest bidder, for four thousand, three hundred and seventy-five dollars, payable on twelve months credit, on his giving

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his bond, with security and a mortgage on the premises, until complete payment.

On the 10th of November, following, the purchaser having failed to comply with the terms of the sale, the plaintiff's counsel, on suggesting these facts to the court, obtained a rule on Holmes, to show cause why a *distringas* should not issue to compel him to comply with the conditions of his bid.

Holmes, in answer to the rule, averred that by advice of Hamblet's counsel, he tendered a bond to the sheriff, with good security and special mortgage on the property sold, for the sum of one thousand four hundred dollars, bearing ten per cent. interest, on seven hundred dollars, from the 1st of November, 1830, and the same interest on seven hundred dollars, from the 1st of November, 1831, to add in all the cost up to that time, and the bond made payable on the 18th of October, 1835, or to settle the costs in cash. The plaintiff refused to accept his bond; but required one for two thousand and thirteen dollars, with ten per cent. interest, from the 18th day of October, 1834, until payment, and a special mortgage. He prays that his bond, first tendered, be accepted, and the rule discharged.

The parish judge decided that the plaintiff was entitled to interest on the amount of the two notes; and interest thereon, up to tho day of sale, but that the interest on the aggregate sum of principal, interest and cost, from that time, until paid, should be at the rate of five per cent. per annum, according to the following calculation:

Amount of capital, in the two notes	$1400 00
Interest on $700, from the 4th of November 1830, to the 18th of October, 1835	347 00
Interest on $700, from the 4th of November, 1831, to the 18th of October, 1835	247 00
Interest on $484, the amount of interest due on the capital, ($1400) due the 18th of October, 1834, (day of sale) to the 18th of October, 1835, at five per cent	24 20
Amount of costs	129 00
Interest, at five per cent., for one year, on $129	6 45
Total	$2183 65

Judgment was rendered, requiring the purchaser, N. Holmes, to execute his bond for the above sum, with security and special mortgage, within three days from the notification of judgment, and on failure, a writ of *distringas* to issue. He appealed, together with the curator *ad hoc* of the absent heir.

Preston, for the appellant.

D. Seghers, contra.

Martin J., delivered the opinion of the court.

The plaintiff suggested and informed the court of the first instance, that at the sale of certain immoveable property, made in pursuance of an order of seizure and sale, which had been obtained against said property, in the hands of the heir of the original purchaser, the defendant became the last and highest bidder for the sum of four thousand three hundred and seventy-five dollars, payable at twelve months, with interest, at ten per cent. per annum, with mortgage retained on the land, according to law, until final payment; and that he refused to comply with the terms of sale, whereupon a rule was taken against him, to show cause why a writ of *distringas* should not issue, to compel a performance of the conditions of sale, on his part.

The defendant answered, that by the advice of the owner of the property seized, he had applied to the sheriff, offering his bond, with good security and special mortgage, for the sum of one thousand four hundred dollars, with interest at ten per cent. on seven hundred dollars, from the 1st of November, 1830, and interest, at the same rate, on the remaining seven hundred dollars, from the 1st of November, 1831, together with all costs added, and the whole sum payable on the 18th of October, 1835; or to settle the amount of costs in cash.

The Parish Court was of opinion that the plaintiff was entitled to interest on the notes due, up to the day of sale, but that the interest due thereon, as well as that due on the

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costs, must be reduced to the rate of legal interest, *i. e.* five per cent.; and, consequently, the amount of the obligation to be delivered to the plaintiff must consist, *first*, of the amount of the two notes, or one thousand four hundred dollars; *second*, of interest, at the rate of ten per cent. from the maturity of each note, to the day on which the defendant was bound to give his obligation, *i. e.* interest at ten per cent. on seven hundred dollars, from the 4th of November, 1830; and on a like sum, the same interest to be allowed, from the 4th of November, 1831, on each, up to the 8th of October, 1835; *third*, of interest, at five per cent., on the amount of interest due on the debt, up to the day of the sale, (October 18th, 1834); *fourth*, the plaintiff to have interest on his costs, from the day of sale until the maturity of his obligation, on the 18th of October, 1835. According to the above *data*, the obligation of the defendant, which he was required to execute and deliver to the plaintiff, amounted to two thousand one hundred and eighty-three dollars and sixty-five cents. Judgment was given accordingly, and both the present defendant, and the one in the writ of seizure and sale, appealed.

The counsel for the appellants have assigned the following errors in the judgment of the Parish Court, and on which they claim its reversal in this court:

1. That interest on interest is allowed, which is contrary to law, and expressly forbidden by the *La. Code, art.* 1984.

2. The present defendant, with the consent of the original one, in the writ of seizure and sale, offered a bond for the amount of the plaintiff's judgment, with interest, at ten per cent. and costs, or to pay the costs in cash. This should have been accepted, and the court erred in requiring more.

The appellee has complained of the judgment, and on his part has asked that it be amended in his favor.

He contends that he is entitled to a bond or obligation, in the sum of two thousand and thirteen dollars, with interest, at the rate of ten per cent., from the 18th of October, 1834, (the day of sale) until paid; instead of an aggregate sum of

two thousand, one hundred and eighty-three dollars and sixty-five cents, payable on the 18th of October, 1835.

It appears to this court, that the provisions of the *La. Code, art.* 1984, invoked by the appellee, relates only to the stipulations of interest, made in a contract by the parties, and does not apply to cases in which the law allows interest.

When the sheriff sells property, on a credit of twelve months, for which two-thirds of the appraised value is not offered, at the first attempt to sell, he must require from the bidder, and the plaintiff is entitled to a twelve months' bond, for the same amount as he would be entitled to in cash, if it had been a cash sale, *i. e.*, his principal debt to the day of adjudication, and costs. This, the defendant in the execution, would be obliged to pay down, if he chose to prevent the sale of his property; and this sum, the purchaser is allowed to retain during a twelve month, on condition of his paying to the plaintiff an interest of ten per cent. This would not be mulcting any one with interest upon interest, on his contract. If the defendant does not buy his own property, and he is at liberty to do so or not, at his pleasure, he is subject to no interest, simple or compound, after the adjudication. If he chooses to buy, *volenti non fit injuria.* He cannot complain, if desirous of making a new contract he be constrained to enter into it on the terms which the law imposes on others. He pays simple interest on the defined price of his purchase; no compound interest is put on his old debt, for if he does not pay the twelve months' bond, and the creditor finds it necessary to avail himself of the judgment on which the *fieri facias* issued, we are not ready to say that the property affected by the registry of the judgment, would be burthened by any additional interest, in consequence of the purchase, nor would any property of his, seized on a *fieri facias*, issued thereafter, be liable to it.

The defendant in an execution is subject to no interest, simple or compound, after the adjudication of his property, whether on credit or for cash.

The Parish Court has, in our opinion, erred in allowing interest at a less rate than ten per cent., to the plaintiff, on any part of what he would have a right to receive in cash, if the sale had not been on credit.

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In a sale of property under execution, on twelve months credit, the purchaser is required to give bond for the whole amount of principal, interest and costs, due on the day of sale, as if made for cash; and on that aggregate sum, the same rate of interest is allowed in the bond, as that on the original debt, from the day of sale.

The judgment is, therefore, erroneous, and is anuulled, avoided and reversed; and this court, proceeding to give such judgment as in our opinion ought to have been given by the court in the first instance, we are first to ascertain what sum the plaintiff would have been entitled to in a cash sale.

He claims, first, his principal	$1400 00
Second, his interest on the two notes, from maturity	484 00
Third, the costs	129 00
Total	$2013 00

To this sum, he appears to us to be clearly entitled, with interest, at ten per cent., *from the day of the adjudication. Code of Practice, art.* 681.

The parish judge was of opinion, that ten per cent. ought to be added to the sum, and the bond or obligation taken for the aggregate amount of capital, interest and cost, with the additional interest for one year. The appellee contends, that the bond or obligation ought to be for the above sum, with interest at ten per cent. per annum, from the day of adjudication until final payment, and not for two thousand two hundred and fourteen dollars and fifty cents.

Either of the two last modes would satisfy the words and spirit of the Code of Practice, art. 681, so equally, that we would not have felt induced to reverse the judgment, and to substitute that which appears most correct; but we are not considering what judgment ought, in our opinion, to have been given in the inferior court. We are not at liberty to give any weight to the opinion of the first judge, in this respect.

We are pressed to add the words, *until paid.* This we decline, because the code has not used them, and because they would, perhaps, be of no use, as the *La. Code, art.* 1931, has provided, that in contracts stipulating conventional interest, it is due from the time stipulated for its commencement, until the principal is paid.

When the judgment of the court *a qua* is amended on appeal, although both parties asked and obtained an alteration, the appellee will be required to pay costs in both courts.

It is, therefore, ordered, adjudged and decreed, that the rule obtained by the appellee, be made absolute, and the

distringas issue, until the appellant, N. Holmes, shall furnish his bond, or obligation, with good and sufficient security, and a special mortgage on the property sold, in the sum of two thousand and thirteen dollars, payable on the 18th of October, 1835, with interest, at the rate of ten per cent. per annum, from the 18th of October, 1834, the appellee paying costs in both courts.

CHALARON *vs.* VANCE.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

A note given in part payment of a contract, for erecting certain buildings secured by a mortgage on the ground, is negotiable, and it is no defence against it, either in the hands of the original or subsequent holder, that the buildings were not completed according to contract.

The paraph of a notary *ne varietur*, on a negotiable note, does not, in any manner, change the nature of its negotiability.

When there is no good and substantial cause for an appeal, it will be considered as frivolous, and taken for delay. In such cases, the judgment appealed from will be affirmed with ten per cent. damages.

This suit commenced by the executory proceedings, in which an order of seizure and sale was obtained against a piece of ground, mortgaged to secure the payment of several promissory notes, executed by the defendant, one of which, amounting to one thousand seven hundred and thirty-three dollars and thirty-three cents, had become due. The plaintiff alleges he is the *bona fide* holder of said note, now due and unpaid, and prays that the mortgaged premises be seized and sold to pay the same.

The defendant set up several grounds of defence, and resisted payment mainly on the ground that the work, for

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which the note now sued on was given in part payment, was not executed according to contract. He obtained an injunction.

The evidence shows the note was endorsed by the payee, in blank, and taken by the plaintiff, in due course of business.

The district judge, considering a difficulty existed, in relation to the mortgaged property, which was intended to secure the whole series of notes given, refused to order the premises to be seized and sold to satisfy this note alone, until the other notes came in for their proportion.

Judgment was rendered against the defendant, for the amount of his note, with interest and costs, reserving the hypothecary rights of the plaintiff, concurrently with the holders of the other notes, against the mortgaged property.

Canon, for the plaintiff.

Gray, contra.

Mathews, J., delivered the opinion of the court.

This is a suit, brought by an endorsee and holder of a promissory note, (made in negotiable form) by the defendant. Judgment was rendered against him in the court below, from which he appealed.

The note now sued on, is one of a series of notes, made by the defendant, in favor of a certain Paul Pandelly, in consequence of an agreement entered into between these parties, in which the latter contracted to erect buildings on a lot of ground belonging to the former. In this contract, a mortgage was stipulated, in favor of the builder, to secure the price of building, which was estimated at fifteen thousand nine hundred dollars, for which three series of notes were given, payable in six, nine and twelve months from the date of the contract. The first of these series, consisting of three notes, were made payable six months after date, and to be delivered to the undertaker, when the buildings should be commenced. Of these notes, that on which the present action is

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based, is one. They were all identified with the contract and mortgage.

In the commencement of this suit, the plaintiff claimed an order of seizure and sale, in pursuance of the summary mode of proceeding on acts importing a confession of judgment. This mode of pursuit was afterwards changed into the *via ordinario*, and judgment rendered in the manner above stated.

The evidence shows, that the buildings were in progress before the note in question was transferred, by endorsement, to the plaintiff. From this statement, it does not appear to us that the defendant could have any legal or equitable grounds to resist its payment, even in the hands of the original payee, much less, in those of an endorsee and *bona fide* holder, in a due course of trade. It has been settled, long since, that a paraph of a notary *ne varietur*, on a negotiable note, does not, in any manner, change the nature of such an instrument, in relation to its negotiability.

We are unable to perceive any good or substantial cause for the appeal. It must, therefore, be considered as frivolous, and taken for the sake of delay, only.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs; and that the plaintiff, in addition to the amount of said judgment, do recover from the appellant and defendant, ten per cent. on the amount thereof, as damages, on account of his frivolous appeal.

A note given in part payment of a contract for erecting certain buildings, secured by a mortgage on the ground, is negotiable, and it is no defence against it, either in the hands of the original or subsequent holder, that the buildings were not completed according to contract.

The paraph of a notary *ne varietur*, on a negotiable note, does not in any manner change the nature of its negotiability.

When there is no good and substantial cause for an appeal, it will be considered as frivolous, and taken for delay. In such cases the judgment appealed from will be affirmed, with ten per cent. damages.

CASTEL & DEVAUX *vs.* THEIR CREDITORS ET ALS.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

On an issue of fraud, the verdict of the jury is entitled to great weight; yet on examining the evidence, if it appears the demands of justice would be best promoted by another trial, the cause will be remanded.

Lafaye and Delpeuch, two of the creditors of the plaintiffs, made opposition to the homologation of the proceedings of the creditors of the insolvents, so far as they had a tendency to discharge the insolvent debtors, or lessen their liabilities, on the ground of fraud, in not making a fair exhibit of their property, and giving undue preference to other creditors over them, and gambling and wasting away their property, &c.

Several specific charges of fraud were made out, to which a general denial was pleaded, and the case, on the evidence produced, was submitted to a jury, who returned a verdict discharging the defendants.

The opposing creditors moved for a new trial, on the ground that the verdict was contrary to law and evidence. The parish judge considered that the jury, when a fair trial was had, were the best judges of the *intentions* of the insolvents to commit a fraud, as charged; and having discharged them, on the whole evidence, refused the motion. From judgment rendered on the verdict, the opposing creditors appealed.

Canon, for the opposing creditors and appellants.

Soulé, contra.

Martin J., delivered the opinion of the court.

Lafaye and Delpeuch, opposing creditors, have appealed from a judgment, discharging the insolvent debtors from an accusation of fraud.

ESCURIX vs. DABOVAL.

On an issue of fraud, the verdict of the jury is entitled to great weight; yet on examining the evidence, if it appears the demands of justice would be best promoted by another trial, the cause will be remanded.

Great is the weight which this court is ever accustomed to allow to a verdict, on an issue of fraud, especially when the party accused is discharged. But on a close attention and examination of the evidence in this case, the impression left on the mind of the court is, that the ends of justice would be best promoted by remanding the case for a second trial.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, avoided and reversed, the verdict set aside, and the case remanded for a new trial, the appellees paying the costs of the appeal.

ESCURIX *vs.* DABOVAL.

APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT.

In an action for false imprisonment and damages, under a *ca. sa.*, which was quashed for having illegally issued, the defendant may show, in justification and mitigation of damages, by argument and reference to the decisions of the Supreme Court, that the judgment quashing the writ is erroneous, when at the trial such judgment has not become *res judicata*.

A judgment, quashing an execution, has not passed in *rem judicatem*, when the matter in dispute is sufficient to authorise an appeal, and when a year has not elapsed from the date of it, to the time of trial, when it is offered as evidence, to show the writ was properly quashed.

This is an action to recover damages, of the defendant, for false imprisonment of the plaintiff, under a writ of *capias ad satisfaciendum*, which was quashed, as having illegally issued.

The defendant, in the present suit, obtained a judgment against the now plaintiff, for a sum of money, and levied his execution on certain property of the latter, which was afterwards claimed by the wife of the defendant in execution, in

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virtue of her judgment and legal mortgage against the property of her husband, and the proceeds of the sale of the property were enjoined in the sheriff's hands.

The execution being returned *nulla bona*, and the defendant having removed to an adjoining parish, the plaintiff in execution, took out a *capias ad satisfaciendum*, directed to the parish where his debtor had removed. He was arrested and imprisoned for about twenty or thirty days, and obtained the prison limits, and finally had the writ of *ca. sa.* quashed. He then commenced the present suit for false imprisonment, claiming three thousand dollars in damages.

The defendant pleaded a general denial: denied false imprisonment, but that the plaintiff was legally arrested under legal process.

On the trial, the plaintiff offered in evidence the judgment quashing the writ of *ca. sa.* under which he had been imprisoned, to show, *first*, that such a judgment had been rendered; *second*, that the writ under which he had been arrested and imprisoned, was decided to be illegal. The defendant's counsel objected to the evidence being received for any other purpose than that such judgment was rendered, (*rem ipsam.*) The court admitted it, to prove the illegality of the writ and arrest; and refused to the defendant the privilege of arguing and reading to the jury the decisions of the Supreme Court, especially the case of *Whitman* vs. *Abat*, 7 *Martin, N. S.*, 162, to show the *ca. sa.* was legally issued, and that the judgment quashing it was illegal. The court refused it, upon the ground the judgment was *res judicata*, until appealed from, between the parties, so far as it established the fact of the writ having improperly issued. The defendant took his bill of exceptions.

The day of the trial was the 23d of October, 1834, and the judgment offered in evidence is dated the 29th of October, 1833.

The cause on the whole evidence, was submitted to a jury, who found for the plaintiff three thousand dollars in damages.

The defendant appealed from the judgment rendered thereon.

A. Seghers, for the plaintiff, insisted that the judgment quashing the writ of *ca. sa.* as illegal, was *res judicata* between the parties, on the day of trial, the 23d of October, 1834, no appeal having been taken. It could not be inquired into, and the judge *a quo* very properly refused to permit any argument to go to the jury, with the view to show it was erroneous. *Pothier Traite des Obligation, No.* 3.

2. On the matters of fact, when damages are to be assessed, the jury are the proper judges of the *quantum*, and the court will not disturb their verdict. 2 *La. Rep.*, 76.

Nicholls, for the defendant, contended that the arrest and imprisonment of the plaintiff was legal, and justified it on the ground that no property was to be found, as shown by the return on the *fieri facias*. 7 *Martin, N. S.* 162. *Ibid.*, 221. 8 *ibid.*, 315.

2. The sale of the property first seized, the proceeds being tied up by the wife's injunction, was no satisfaction of the execution and judgment. The defendant was not bound to await the result of a tedious law-suit before proceeding against the person of his debtor.

3. The court *a qua* erred, in permitting the judgment quashing the writ of *ca. sa.* to prove any thing else, than that such judgment was rendered, (*rem ipsam.*)

4. The defendant had the right to show, by the decisions of this court, that the writ of *ca. sa.* properly issued in a case provided by law. These decisions are the highest evidence of what the law is, coming from the tribunal of the last resort.

5. The judgment, quashing the writ, might put an end to the imprisonment, but cannot change the law. It is no evidence of the law, as it was still open to appeal.

6. Nothing short of payment could satisfy the judgment, or deprive the appellant of the right of using all the means afforded by law, to coerce it. 3 *Martin*, 331.

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7. The damages are excessive. For error of judgment, in issuing the writ improvidently, and in the absence of proof of malice, the defendant should not be mulcted in vindictive damages.

Martin, J., delivered the opinion of the court.

In this case, the defendant has appealed from a judgment rendered on a verdict, in an action of false imprisonment.

He had obtained a judgment against the present plaintiff, and caused execution to be levied on some property, but the wife of the debtor procured an injunction to stay the proceeds of the sale of the property seized, in the sheriff's hands, in order that it might be paid over to her in discharge of a judgment she had obtained against her husband. The judgment creditor took out an alias *fieri facias*, directed to the sheriff of another parish, and on the return of *nulla bona*, sued out a *ca. sa.*, on which the debtor was arrested and imprisoned about twenty days, when he succeeded in having the writ of *ca. sa.* quashed. He was then liberated. For this alleged illegal arrest and detention, an action for false imprisonment was instituted, and he recovered three thousand dollars in damages.

The present defendant seeks to reverse and annul this judgment, on the score of excessive damages, and because the court denied him leave to show, by argument, and the reading of several decisions of this court, that the inferior court had erred in its decision, quashing the writ of *ca. sa.* The refusal was asked on the ground that the judgment quashing the *ca. sa.* was *res judicata.*

The position of the plaintiff was supported, and reliance placed, on the authority of 2 *Pothier on Obligations, part* 4, *chap.* 3, *sec.* 3, *art.* 1, *No.* 3.

We thence learn that the Ordinance of Louis XIV. in 1667, has joined in the same article, judgments in the last resort, and others susceptible of appeal, but not yet appealed from.

The Louisiana Code, in the chapter on the signification of terms, No. 9, has given the definition of *res judicata.* "*Thing*

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adjudged," is said of that which has been decided by a final judgment, from which there can be no appeal, either because the appeal did not *lie*, or because the time fixed by law for the appeal is elapsed, or because it has been confirmed on the appeal.

In the present case, the matter in dispute is sufficient to authorize the appeal; and as one year had not elapsed between the quashing of the *ca. sa.*, and the trial which preceded the judgment appealed from, it follows that the time for appealing from the former one had not elapsed. It had not, consequently, passed in *rem judicatem.*

This takes from the appellee the only means of defence which he has urged before this court. We have, therefore, not examined whether a judgment, which has not yet become *res judicata*, may be incidentally examined between the same parties, in the court which has rendered it. This court being of opinion that the defendant ought to have been allowed, by argument and reference to decisions of the Supreme Court of the state, to show that he had reason to believe that in taking out the *ca. sa.*, he exercised a legitimate means for the securing of money tortiously withheld from him, if not in positive exculpation of his conduct, at least in mitigation of the damages claimed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, the verdict set aside, and the case remanded, with directions to the judge to proceed therein, and to allow the defendant, by argument and reference to decisions of this court, (if not positively to exculpate himself, on which we give no decision,) at least to mitigate the damages claimed; the plaintiff and appellee paying costs in this court.

In an action for false imprisonment and damages, under a *ca. sa.*, which was quashed for having illegally issued, the defendant may show, in justification and mitigation of damages, by argument and reference to the decisions of the Supreme Court, that the judgment quashing the writ is erroneous, when at the trial such judgment has not become *res judicata.*

A judgment, quashing an execution, has not passed in *rem judicatem*, when the matter in dispute is sufficient to authorise an appeal, and when a year has not elapsed from the date of it, to the time of trial, when it is offered as evidence, to show the writ was properly quashed.

GUILLIET *vs.* ERWIN

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

Where the defendant lives alternately in Kentucky and Louisiana, prescription only runs for the time he is actually in this state.

So, where two years had elapsed, from the date of the sale until institution of suit, for redhibitory vices in slaves, and it was shown the defendant had only been ten months in the state, during that time: *Held* the action was not prescribed by the lapse of one year.

This is a redhibitory action, for the rescission of the sales of two slaves and return of the price.

The plaintiff alleges, that in February and March, 1829, he purchased two slaves from the defendant, for six hundred dollars each. That soon afterwards, one was discovered to be crazy or mad, and ran away, and the other had a consumption, of which he died shortly afterwards. He alleges both slaves are dead, and the defendant refuses to return him the price, being twelve hundred dollars, for which he prays judgment.

The defendant admitted the sale of the slaves, but expressly denies all the other allegations in the petition, and pleads the prescription of one year.

The evidence showed the slaves became diseased after the sale, and ultimately died in the possession of the defendant. But the testimony was a little contradictory as to the origin and time when the disease actually existed.

It also appeared, that the sales were made in February and March, 1829, and suit was not commenced until March, 1831; that the defendant lived alternately in Kentucky and Louisiana, and had been repeatedly in this state, after the contract of sale, and from the testimony, the whole time was about ten months of actual residence here in the interval.

The plaintiff had judgment for the return of the price paid for the slaves, with legal interest from judicial demand.

The defendant appealed.

Canon, for the plaintiff.

McCaleb, for the appellant.

Mathews, J., delivered the opinion of the court.

This is a redhibitory action, in which the plaintiff obtained judgment in the court below, and the defendant appealed.

The allegations of the petition relate to two slaves, sold by the defendant to the plaintiff; and the redhibitory defects stated to have been inherent in them, are idiotism or madness in one, and confirmed consumption in the other. The evidence of the case, (although somewhat contradictory,) such as it was admitted by the court below, (and, in our opinion properly admitted, notwithstanding several bills of exception) establishes the existence of the vices or defects in the slaves, as alleged, sufficient to form a legal ground of redhibition.

The answer of the defendant, however, contains a plea of prescription on which his counsel seems much to rely.

Where the defendant lives alternately in Kentucky and Louisiana, prescription only runs for the time he is actually in this state.

So where two years had elapsed, from the date of the sale until institution of suit for redhibitory vices in slaves, and it was shown the defendant had only been ten months in the state, during that time: *Held*, the action was not prescribed by the lapse of one year.

The suit was not brought within the delay prescribed by law: but the absence of the defendant from the state, who is not domiciled within its limits, is offered as an excuse and justification on the part of the plaintiff, for not having commenced his suit. This justification is founded on the maxim, *conta non valentem agere, non curret prescriptio.* The service of citation on the defendant was made on the 15th of March, 1831. The sales of the slaves in question, to the plaintiff, are dated in February and March, 1829. On the 11th of June of this year, the defendant left the state. He returned on the 5th of December, of the same year, and left again on the 24th of April, 1830, and came back about the 10th of January, 1831, a little more than two months previous to the commencement of the present suit. It results from calculations based on these data, that the defendant had been in the state about ten months only, at different periods

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subsequent to the date of the earliest bill of sale, made by him to the plaintiff, of the slaves in dispute; consequently, a whole year had not expired, within which he had a right to act and could act against the defendant, before the institution of this suit, and as a necessary consequence of the foregoing premises, it follows that the plea of prescription fails.

We have said in general terms, without specific arguments on the several bills of exception, found on the record, that the testimony offered on the part of the plaintiff, was properly admitted by the court below. But should we admit doubts whether the testimony of the witness, E. D. White, ought not to have been rejected, on the score of interest, leaving it out of the question, our conclusion would be the same.

This testimony has relation, principally, to a consent or agreement of the seller to take back the slaves complained of by the purchaser, but the causes of redhibition being established by other competent evidence, and the plea of prescription having failed, the plaintiff's case is considered as fully made out.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

BEAL & WIFE *vs.* BRANDT & WIFE.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where the notice to take a deposition is not given in full time, as required by law, yet when the party sends her attorney to the commissioner, who appears, and objects to taking the deposition, on the ground of defective notice, this fact will render the notice sufficient.

Where the name of a witness is written *C. Swabine* in the affidavit for a commission, and *Catherine Swab* in the deposition, the discrepancy in names will not vitiate the deposition, when it is in other respects taken according to law.

The law does not require a commissioner before whom a deposition is taken, to reduce it to writing personally. It is sufficient, if not written by the witness, that it be reduced to writing by any indifferent person.

When a deposition is accompanied by the certificate of the commissioner, that it was taken by him, and sworn to and subscribed before him, it is a sufficient *proces verbal* of the manner of taking it.

This is an action of slander, for slanderous words spoken by the wife of Brandt, respecting the wife of Beale, and for an assault and battery committed by Beale on Brandt's wife; damages laid at one thousand dollars.

The plaintiffs allege that the wife of John Brandt, publicly, maliciously and wickedly called Mrs. Rosina Beale a thief and a whore, and with a view to defame her character; that such charges are false and malicious, and have damaged her in the estimation of her neighbors. They further allege, that John Brandt came to plaintiffs' house, and in the absence of her husband, without cause, assaulted, beat and whipped the plaintiff, Mrs. Beale, in a cruel manner; all of which matters have caused her great injury and damage, to the amount of one thousand dollars.

The defendants pleaded a general denial, and alleged that Rosina Beale, one of the plaintiffs, had for four months harras-

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sed and slandered Mrs. Brandt, calling her a thief, and charging John Brandt the husband, with stealing sheep, &c., all of which is false and malicious, and was uttered by Mrs. R. Beale, knowing it to be false, and with a view of injuring her in public estimation, &c.; that in consequence of said slander and defamation, she has suffered damage, to the amount of five thousand dollars, for which she prays judgment in re-convention.

The plaintiffs excepted to the plea and demand in re-convention of the defendant, as matter independent, and unconnected with, and not incidental to the cause of action; they averred the demand and allegations set up in defendants' answer were too vague and uncertain, as to time and the manner of making the charges alleged, and pray that the answer be amended.

On the trial, the reading of the deposition of a certain Catherine Swab, was objected to by the defendants' counsel, on various grounds, as stated in the opinion of this court, but being admitted, the defendants' counsel took his bill of exceptions.

The cause was submitted to a jury on all the testimony, who returned a verdict for the plaintiffs of two hundred and fifty dollars. From judgment rendered on this verdict, the defendants appealed.

Culbertson and Kennicott, for the plaintiffs.

Roselius, contra.

Martin, J., delivered the opinion of the court.

This is an action of slander, and assault and battery, with a claim for damages. The hopes which the fair defendant entertains of having the judgment of the fair plaintiff reversed, rest on the alleged error of the judge *a quo*, in admitting testimony offered by the plaintiff, but objected to by the defendant.

The grounds on which the reading of the deposition offered by the plaintiff, was objected to, are :

1. The insufficiency of the notice.

2. That of the affidavit on which the commission issued.

3. That the deposition was not reduced to writing by the commissioner.

4. That no *procès verbal* is annexed to the commission.

It appears that the notice was issued on the 30th of April, to appear before the commissioner on the same day, at two o'clock, P. M. The hour at which the service was made, does not appear in the record, but has been stated in argument to have been about 11 o'clock, A. M. The witness was obliged to leave the city unexpectedly and go home, on account of her husband's sickness, and that she had not communicated this to the plaintiff, until the morning of the day on which she was examined, being the eve of the one on which she expected to depart.

As all the parties resided in New-Orleans, and the defendant sent her attorney to the commissioner's office, for the purpose of objecting to the insufficiency of the notice, before she heard the deposition was taken, we conclude the notice was sufficient.

2. The affidavit on which the commission issued, is objected to, on account of the inaccuracy in the name of the witness, and because it is said the affidavit is not made as the law requires. In the affidavit, the name of the witness is written C. Swabine, and in the deposition she is called Catherine Swab. In other respects the affidavit appears to us, to have been made according to the article 430 of the Code of Practice, under which we suppose the commission was asked for. Swab may be a contraction of Swabine; as the attorney of the defendant objected before the commissioner, to the shortness of the notice only, we think the District Court did not err, ordering the deposition to be read.

3. Nothing in our law requires the commissioner to reduce the depositions he receives to writing personally. It suffices when not written by the witness, that they be taken down by an indifferent person. In the present case the deposition was taken by the clerk of the commissioner, an associate justice of the City Court.

Where the notice to take a deposition is not given in full time, as required by law, yet when the party sends her attorney to the commissioner, who appears and objects to taking the deposition, on the ground of defective notice, this fact will render the notice sufficient.

Where the name of a witness is written *C. Swabine* in the affidavit for a commission, and *Catherine Swab* in the deposition, the discrepancy in names will not vitiate the deposition, when it is in other respects taken according to law.

The law does not require the commissioner before whom a deposition is taken, to reduce it to writing personally. It is sufficient, if not written by the witness, that it be reduced to writing by an indifferent person.

When a deposition is accompanied by the certificate of the commissioner, that it was taken

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4. The commission and deposition are accompanied with the commissioner's certificate, of the deposition having been taken by him.

The deposition was, in our opinion, properly received in evidence.

by him, and sworn to and subscribed before him, it is a sufficient *procès verbal* of the manner of taking it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

HART & CO. *vs.* ST. ROMES ET ALS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where offences are committed by slaves belonging to several masters, by their order, they will be liable as direct trespassers *in solido*.

But where the slave of A, in company with the slaves of B, commits an offence, it is clear that A cannot, according to the *Louisiana Code*, be made responsible beyond the value of his slave, if he thinks proper to abandon him.

After the master abandons his slave, he still retains a residuary interest: that if the sale of him produces more than the amount of the damages awarded, he is entitled to the surplus.

The master is not *in mora* in making the abandonment of the slave until three days after the judgment. Until the judgment is *res judicata*, the party has not lost his right of liberating himself by abandonment; or if the abandonment becomes impossible by a fortuitous event, without the fault of the master, he is liberated.

Where several slaves, belonging to different masters, commit a theft, the masters should be condemned to pay in proportion to the number of slaves respectively who were accomplices in the theft.

So where A was the owner of three out of five slaves concerned in a robbery, he is liable to pay three-fifths of the value of the stolen goods.

The plaintiff alleges that his store on Chartres-street, in the city of New-Orleans, was broken open by several slaves belonging to the defendants, and goods, jewelry and merchandise, to the value and amount of two thousand five hundred and fifty-six dollars and seventy-nine cents, stolen by said slaves, for which their masters are liable *in solido*. The petitioners annex an account of the goods stolen, with the value and amount thereof, and an affidavit that the account is true, and the loss happened in the manner described in the petition.

St. Romes pleaded a denial generally; and specially denied that there was any *solidarity* between him and the other defendants, or that his slaves had any agency in the theft alleged.

Debuys pleaded a general denial; and also abandoned his slave to be sold according to law in case of liability.

Baylé pleaded the general denial.

On the trial, the evidence fully established the robbery of the plaintiffs' store, of the goods and to the value and amount charged, by the slaves Charles, Sophia and Frontin, belonging to the defendant St. Romes, the slave Jean Pierre, belonging to Debuys, and slave Aglaë, owned by Baylé.

The district judge rendered judgment in favor of the plaintiffs for the amount of their claim, against the defendants *in solido*.

St. Romes, one of the defendants, appealed.

Janin, for the plaintiff, contended that the evidence fully justified the judgment of the District Court in relation to the amount of the plaintiffs' claim, and it must therefore stand.

2. The questions of law respecting the liability of the defendants, are also correctly decided and settled. When an offence is committed jointly, by several slaves belonging to

different masters, the latter are responsible, *in solido*, for the damages. *Louisiana Code, art.* 180, 2300, 2304. *Code of Practice*, 114. *Digest of Roman Law, lib.* 9, *tit.* 4, *de nox. act. lex* 41. *Ibid, lib.* 47, *tit.* 4, *lex* 1, § 19. 11 *Toullier*, 211, 403. *Pothier on Obligations, No.* 453. *Paillet, art.* 1384, *No.* 16. *Pothier's ed. Pandects, vol.* 4, *p.* 485—487, 489, 499, *translated into French.*

3. When the slave dies after the master is *in morâ*, or after the institution of suit, he is bound for the amount of damages and cannot liberate himself. *Digest, lib.* 9, *tit.* 4, *lex* 16, *de nox. act. lex* 26, §4. *Ibid, lib.* 44, *tit.* 7, *(de oblig.) lex* 45, *note* g *of Godefroy. Ibid, lib.* 9, *tit.* 4, *(de nox. act.) lex* 29, § 4.

4. The last mentioned point does not bear on this case, as the surviving slaves were not abandoned within the legal delay.

Canon, contra.

Bullard, J., delivered the opinion of the court.

This suit was instituted to recover of the defendants, *in solido*, the value of certain merchandise alleged to have been stolen, at different periods, by the slaves of the defendants, from the store of the plaintiffs. The District Court was satisfied, from the evidence adduced, that the thefts were committed by Jean Pierre, a slave of Pierre Debuys; by Charles, Sophia, and Frontin, belonging to the defendant, St. Romes; and Aglaë, a slave of the other defendant, Baylé, and condemned the masters to pay, *in solido*, the value of the stolen goods, to wit: the sum of two thousand five hundred and fifty-six dollars and seventy-nine cents. From this judgment St. Romes alone has appealed.

The evidence in the record, which we have attentively examined, satisfies our minds, as it did that of the judge *a quo*, that the slaves above mentioned committed the depredations in question, and the plaintiffs are entitled to remuneration, at least to the value of the slaves. But it is contended that the judge erred in condemning the masters, *in solido*.

On the other hand, it is urged that if the slaves were persons, *sui juris*, they would be liable, *in solido*, for damages committed by them jointly, and that the masters are liable in the same manner the slaves would be if personally amenable in an action of trespass. It is a well settled doctrine of our law that *solidarity* is never implied. It is equally true that joint trespassers are severally bound, but the Code has regulated the responsibility of masters in a manner which seems to us inconsistent with the idea of *solidarity*, properly so called. Articles 180 and 181 declare the liability of the master for the offences and *quasi* offences of his slave, but expressly provide that he may discharge himself from such responsibility by abandoning his slave to the person injured, provided the abandonment be made within three days after the judgment awarding such damages, and that the offence was committed without his order.

Where offences are committed by slaves belonging to several masters, by their order, we have no doubt the masters would be liable as direct trespassers, *in solido*. But if the slave of A, in company with several slaves of B, commits an offence, it is clear that A cannot, according to the Code, be made responsible beyond the value of his slave, if he thinks proper to abandon. In what sense of the word, then, can he be said to be bound, *in solido*, with B? It surely will not be pretended, that if the owner of the larger number of slaves concerned in a robbery should pay the whole amount of damages committed, he would be entitled to an action against the other masters whose slaves were accomplices, to compel an equal contribution, as in the case of an obligation *in solido*. Such a proceeding would equally violate the positive provision of the code, according to which the liability of the master is in all cases measured by the value of the slave, if he chooses to surrender him. It would be permitting that to be done indirectly which could not be done directly.

Where offences are committed by slaves belonging to several masters, by their order, they will be liable as direct trespassers *in solido*.

But where the slave of A in company with the slaves of B, commits an offence, it is clear that A cannot, according to the *La. Code*, be made responsible beyond the value of his slave, if he thinks proper to abandon him.

But the counsel has called our attention to numerous passages of the Roman Digest, particularly the 4th title of the 9th book, which treats of the *actio noxalis*, and which, he supposes, support the doctrine contended for by him. It

results from all those provisions of the Roman laws, according to our understanding of them, that the *actio noxalis*, properly speaking, was essentially an action *in rem*, and followed the offending slave into whosoever hands he might pass after the commission of the offence. Not only might the master liberate himself by an abandonment of the slave, but the death of the offender, before the master was in delay in relation to the abandonment, operated, *ipso facto*, as a release of his liability. In cases where the master had fraudulently ceased to possess the slave, as by conniving at his escape with a view to evade responsibility, he was liable to the *Pretorian action*, and had no longer the right to abandon. It is in reference to this action, and not to the direct *noxalis*, that Julian declared, in the passage particularly relied upon by the plaintiffs' counsel, that if a slave belonging to several masters commit a theft, the party injured might select either of the owners and recover the whole damage. The case supposed by him, is when all the joint owners participated in the fraud practised, to evade the direct action: *Omnes dolo fecerint quominus sum in protestate haberant.* The same principle would apply where several slaves belonging to several masters had concurred in the offence, and all the masters had united in an attempt to remove the slaves fraudulently. In that case they would become personally wrong doers, and each responsible, *in solido.* In all such cases the party aggrieved had a right to pursue the slave himself, *actione noxali*, or to resort to the *Pretorian action.*

The passage in the 47th book of the Digest, on which the counsel also relies, does not appear to us to sustain him. The principle therein established is, that if several slaves are emancipated and fraudulently commit a trespass, each is liable, *in solido;* and in cases of crimes it goes further: "*Ex cum ex delicto conveniatur, exemplo furti, nullus eorum liberetur, etsi unas conventus præstiterit.*"

The counsel for the plaintiff contends for the further proposition, that when the slave dies after the master is *in mora*, or after the institution of the suit, the master is bound for the full amount of damages, and cannot liberate himself by an

abandonment. A careful examination of all the laws cited in support of this doctrine, has brought us to the conclusion, that in relation to the direct *actio noxalis* the master might abandon even after judgment. A distinction is made: if the master abandoned at the inception of the action, the complainant became seized only of the rights of the master, such as they were, and the master was fully released. If he made a defence and abandoned after condemnation, he was bound to convey the whole property in the slave, and became, in effect, warrantor of title: "*Sed oportet ret hujus dominium in solidum et pleno jure transferat in actorem.*"

Our own code, while it has adopted the general principles of the Roman law, in relation to this action, has at the same time created some remarkable differences. In the first place, the abandonment on the part of the master, does not vest in the party aggrieved, the title to the offending slave. The master still has a residuary interest, if a sale of the slave produces more than the amount of the damages awarded. In the second place, the master is not in delay in making this abandonment, until three days have expired after the judgment. Until the judgment has acquired the authority of the thing adjudged, we are of opinion the party has not lost his right to liberate himself by an abandonment; and if the abandonment becomes impossible, by a fortuitous event, without the fault of the master, he is liberated from responsibility.

After the master abandons his slave, he still retains a residuary interest, that if the sale of him produces more than the amount of the damages awarded, he is entitled to the surplus.

The master is not *in mora*, in making the abandonment of the slave, until three days after judgment. Until the judgment is *res judicata*, the party has not lost his right of liberating himself by abandonment; or if the abandonment becomes impossible by a fortuitous event, without the fault of the master, he is liberated.

We have thought proper to be thus minute in the investigation of these questions, and perhaps, to anticipate some which may arise in the further prosecution of this case, because the case is novel and the principles involved important in this state. Our researches have not enabled us to find a single case, in which the responsibility of several masters, in relation to each other, for the joint offence of their respective slaves, has been judicially settled. The Code does not expressly provide for a case of this kind. In the absence of positive enactments, we think ourselves bound to decide according to natural equity, and in such a way as not to violate any settled principles in relation to the liability

Where several slaves belonging to different masters, commit a theft, the masters should be condemned to pay in proportion to the number of slaves respectively, who were accomplices in the theft.

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So where A was the owner of three out of five slaves, concerned in a robbery, he is liable to pay three-fifths of the value of the stolen goods.

of masters, and more especially, not to make one master liable for the thefts committed by the slaves of another, nor for those committed by his own, beyond their value, if he makes a fair abandonment in due time. The rule of decision which, after mature reflection, appears to us most equitable and in consonance with those principles is, that the masters should be condemned to pay in proportion to the number of their slaves respectively, who were accomplices in the commission of the offence. St. Romes is the only party who has appealed, and he is shown to be the owner of three out of the five slaves concerned in the robbery, and, in our opinion, is liable to pay three fifths of the value of the stolen goods.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed and annulled, and that the plaintiffs recover of the defendant and appellant, St. Romes, the sum of fifteen hundred and thirty-four dollars and seven cents, with costs of the District Court, those of the appeal to be borne by the plaintiffs and appellees; provided that this judgment shall be without effect, if, within three days after it shall have become final, the defendant shall abandon the surviving slaves, Charles and Frontin, according to law.

TUTHILL & FULLER *vs.* EMERSON.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where the syndic makes himself a party plaintiff to a suit, in place of the original one, who is a ceding debtor, without objection on the part of the defendant, he has the right to contest the case and receive judgment.

The objection to the capacity of the plaintiff to sue, comes too late after answer to the merits and the jury are sworn on the trial.

This is an action, by two partners in building, to recover from the defendant three thousand six hundred dollars, the price of building six two story houses, and five hundred dollars for extra work, and one thousand dollars in damages, for delays occasioned by the defendant, in not furnishing materials as fast as the work progressed, according to contract.

The defendant pleaded a denial, and set up a demand in compensation of that sued on, for the sum of two thousand and sixty-two dollars, for advances and payments made to the plaintiffs. He alleges the work was badly done, delayed a year beyond the time agreed on in the contract, and finally abandoned by the plaintiffs, and was completed by other workmen, employed at his own expense, all of which occasioned him three thousand dollars damages, for which he prays judgment in reconvention.

This suit was instituted in February, 1831. On the trial the defendant offered in evidence the record of a suit of Tuthill *vs.* His Creditors, filed in March, 1830, which showed that one of the plaintiffs was insolvent, and had made a surrender in favor of his creditors, and a syndic appointed; and at the same time, moved the court to instruct the jury that no verdict could be found against the defendant, as suit was not instituted in the name of the syndic of Tuthill, and Fuller the other partner. The court refused the instruction,

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but charged that the plaintiffs could recover, as the syndic was subsequently made a party, on motion of the plaintiffs' counsel. The defendant excepted to the opinion and charge of the court.

Upon the evidence of the case, the jury returned a verdict for the plaintiffs, in the sum of two thousand and eighty-two dollars, upon which judgment was rendered in favor of the syndic and Fuller. The defendant appealed.

Gray, for the plaintiffs.

1. The objection that the suit was not brought in the name of the syndic of Tuthill and Fuller, should have been pleaded as an exception, and time allowed for the opposite party to produce evidence to contradict it; otherwise, it is taking the party by surprise. *Code of Practice, art.* 327, 346.

2. Had an exception been pleaded, the court would, even afterwards, have allowed an amendment, which would have brought the proper parties before it. 4 *La. Rep.*, 150.

3. The syndic was properly made a party, on motion of the plaintiff, before the trial. Such a motion was equivalent to a supplemental petition. 2 *La. Rep.*, 392.

4. The verdict of the jury is not excessive; nor, indeed, as much as the evidence warranted, because no allowance is made for damages occasioned by the delay of the defendant.

Conrad, for the appellant.

1. The plaintiffs suit should have been dismissed for want of proper parties, as Tuthill had made a cession of his property at the time of suit, and could not stand in judgment in a case which arose before his insolvency and failure. 4 *Martin, N. S.* 103.

2. This defect in the pleadings could not be cured in an *ex parte* motion, making the syndic of Tuthill a party, and which motion was not made until a year after the suit was at issue. 2 *Martin*, 144. 6 *Martin, N. S.* 417.

Bullard, J., delivered the opinion of the court.

In this case our attention is drawn to a bill of exceptions, from which it appears, that on the trial of the case, the defendant's counsel having introduced the record of a suit by Tuthill, one of the plaintiffs against his creditors, by which it appeared that he had made a surrender of his property as an insolvent debtor, and that a syndic had been appointed, moved the court to instruct the jury, that no verdict could be rendered by them against the defendant, on the ground, that the suit should have been instituted by the syndic jointly with the other plaintiff. The court refused to give that charge, but on the contrary, instructed the jury that the suit could be maintained, because the syndic by an *ex parte* proceeding, had made himself a party to the suit on motion.

Where the syndic makes himself a party plaintiff to a suit in place of the original one, who is a ceding debtor, without objection on the part of the defendant, he has the right to contest the cause and receive judgment.

We are of opinion the court did not err, although the plaintiff, who had made a surrender, was without capacity to sue in relation to a debt due him before the surrender, yet his syndic came in and made himself a party, without any objection on the part of the defendant. No exception was made to the capacity of the plaintiff; on the contrary the answer goes to the merits, and sets up a demand in reconvention. The objection came too late, after the jury had been sworn to try the issue on the merits of the case.

The objection to the capacity of the plaintiff to sue comes too late, after answer to the merits, and the jury are sworn on the trial.

On the merits, an attentive examination of the evidence, has failed to convince us that the verdict was erroneous.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

FEATHERSTONE *vs.* ROBINSON.*

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF ST. TAMMANY.

Where the plaintiff sues as heir of his wife, and his capacity to sue not being denied by the pleadings, he was not required to prove his wife's death.

Civil Code of 1808, required all the formalities in a will to be complied with, before turning aside to other acts, but did not require mention of these in the will.

Irregularity and impropriety in the form of action is waived by pleading to the merits, and proceeding to trial without making the objection.

Judgment will be reversed, where interest is allowed on an unliquidated claim.

The plaintiff sues to recover his late wife's inheritance from the defendant, as executrix of her deceased mother. He alleges that Maria Badon died in 1820, leaving nine children as her heirs; that he intermarried with one of said heirs, who also died in 1825 without descendants, and leaving a will in which she made her husband, the present plaintiff, her universal heir and legatee; that previous to the death of his wife, another of the heirs of her mother died, and before partition, leaving her estate to be divided into eight portions or parts; that said Maria Badon left property, estimated in the inventory of her succession, at eight thousand and seventy-six dollars, to which he, as legatee of his wife, was entitled to one-eighth part. He prays that the executrix be required to render an account, and that the money and property be divided among the heirs, and his portion in right of his wife, be paid over to him.

* This case was decided at February term, 1827, and suspended by an application for a re-hearing until this term. The re-hearing was refused.

The plaintiff annexed a copy of the will made by his late wife, before C. Pollock, notary public, to his petition.

The executrix addressed a letter to the judge of probates, praying further time in which to render her account, and shortly afterwards presented three accounts, one of the estate of her testatrix, and one against each of the deceased heirs, including the late wife of the plaintiff.

The probate judge, after adjusting the accounts, rendered judgment in favor of the plaintiff, for one thousand one hundred and fourteen dollars and eighty-four cents, as the portion of his deceased wife of the funds on hand, and reserved his share in a tract of land remaining to be divided, until partition was made. The executrix appealed.

Preston, for the plaintiff.

1. The will under which the plaintiff claims, is made in due form of law, before a notary public.

2. It could not have been recorded in the office of the register of wills, or ordered to be executed here, as Mrs. Featherstone's succession was opened in the parish of St. Tammany. Had the probate of the will and Mrs. Featherstone's death been denied, they would have been proved.

3. The sum for which judgment was rendered, shows it to be one-eighth part of the proceeds of Mrs. Badon's succession then on hand, to which the plaintiff was entitled as heir of his wife.

4. The claim set up by the executrix, in her account against the succession, and against Mrs. Featherstone, are unsupported by vouchers, and cannot be allowed.

5. The parish judge being perfectly acquainted with the succession, settled and adjusted the accounts from his own personal knowledge of them, and from what appeared on the record.

6. The executrix has charged Mrs. Featherstone with five hundred dollars, advanced to her by her father, in his life-time. This has nothing to do with her mother's estate, and is wholly inadmissible.

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FEATHERSTONE vs. ROBINSON.

Hennen and Denis, for the defendant, assigned errors apparent on the face of the proceedings in the Probate Court, on which they rely for the reversal of its judgment. They are stated in the opinion of the court.

2. The defendant's counsel further contend, that when the executrix obeyed the order of court, and filed her account, that the plaintiff (if he had any) should have filed his written objections and opposition to each item in the account, to which he might object, that it be established or rejected, as justice and the law requires. *Code of Practice*, 1004.

3. The objections must be made in three days, and not having been done, the account must be taken as correct. Executors, &c., are sworn officers of the law and the court, and their accounts are *prima fac'e* evidence of their correctness. The judgment in this case is therefore erroneous, and should be reversed, and the executrix's accounts allowed.

Martin J., delivered the opinion of the court.

In this case the plaintiff sues as heir of his late wife, to recover from the defendant, as the executrix of his wife's mother, the portion which his wife inherited from her mother. The plaintiff obtained judgment in the Court of Probates, from which the defendant appealed.

The appellant in this court, relies upon the following assignment of errors:

1. There is no evidence of the death of the plaintiff's wife.

2. The document annexed to the petition, is illegal evidence of her will, being the copy of a copy. The will does not appear to have been presented to the Court of Probates, nor its execution ordered; and because the document appears to be in fact no will, as it contains no mention that the legal formalities were complied with, without interruption or turning aside to other acts.

3. The suit is wrongfully brought for an account of the estate, instead of the plaintiff claiming to be recognised as heir of his wife.

4. The defendant had nothing to do but to file her account, and the plaintiff ought to have filed written objections to any exceptionable item found therein.

5. The Probate Court erred in refusing to allow the funeral expenses, and in allowing interest.

I. The plaintiff in this case sued as heir of his late wife, and his capacity not being denied by the pleadings, there was therefore, no necessity to prove the death of his wife, without which he could not be her heir. *Nemo est hares viventes.*

Where the plaintiff sues as heir of his wife, and his capacity to sue not being denied by the pleadings, he was not required to prove his wife's death.

II. It appears from the record, that no opposition was made in the Probate Court, to the admissibility of the document annexed to the petition, in evidence, which is now objected to in this court.

The former Code required indeed, that all the formalities in a will should be complied with, without any interruption, and without turning aside to any other acts; but it did not require, that mention of this circumstance be made in the will. *Civil Code, art.* 92, *p.* 228.

Civil Code of 1808, required all the formalities in a will to be complied with, before turning aside to other acts, but did not require mention of these in the will.

III. In relation to the manner of bringing the suit, any impropriety or irregularity in the form of the action was waived, by pleading to the merits, and proceeding to trial without making the objection.

Irregularity and impropriety in the form of action is waived, by pleading to the merits, and proceeding to trial without making the objection.

IV, V. The plaintiff charged the defendant, as executrix of his late wife's mother, claiming the portion she inherited from her said mother.

The defendant filed an account, and the court gave judgment for the balance, after striking off such items as were unsupported by proof. Interest was however, in our opinion, improperly allowed. The sum claimed was not liquidated, until ascertained by the judgment of the court. In this respect only, the judgment of the Probate Court is erroneous.

Judgment will be reversed, where interest is allowed on an unliquidated claim.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be annulled, avoided and reversed; and the plaintiff recover from the defendant the sum of nine hundred and thirty-four dollars and sixty-two cents, with costs in the Court of Probates; and that the costs of the appeal be borne by the appellee.

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ACTION.

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5. When the evidence shows that the *locus in quo* does not cover the high road, a street, levee, or tow-path, and is consequently subject to private ownership, whether the plaintiff be the real owner or not; or whether the premises in dispute be public or appropriated absolutely to public uses, are questions not permitted by law in possessory actions..... *ib.*

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8. In a possessory action, where the defendant alleges in his answer that he purchased the disputed premises from the government of the United States, and assumes to call on it to warrant his possession, the court will disregard this part of the answer, and all the evidence that goes to establish or invalidate titles on both sides.....*Thomas* vs. *Baillo*, 410

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10. In a possessory action, when the judgment describes the contested premises with sufficient accuracy to enable the sheriff to execute a writ of possession, accompanied with a copy of the judgment, without exercising a dangerous discretion, the judgment will not be disturbed..... *ib.*

11. But in a possessory action, when the premises in contest are so vaguely described in the pleadings that they cannot be designated with any certainty, and the verdict and judgment are general, "that the plaintiff recover the possession of *the land sued for*," they will be set aside as being too vague, and the case remanded.....*Williams* vs. *Kelso*, 406

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AMICABLE COMPOUNDERS.

1. In cases submitted to referees, *without* granting them the power to act as amicable compounders, the court may revise and rectify any errors contained in the award rendered by them..... *Davis* vs. *Leeds*, 471

2. When a cause is submitted to referees, with power to act as amicable compounders, their award, rendered in pursuance of the submission, and made in relation to the matters actually referred to them, is without amendment, revision or appeal. ..... *ib.*

3. The award of amicable compounders, which has no relation to the matters in dispute submitted to them, is absolutely null and void; and when their acts show dishonesty, gross misconduct, want of due regard to well settled principles, or extreme partiality in rendering their award, these will be good grounds for setting it aside..... *ib.*

4. Amicable compounders are not required to determine according to strictness of law, but are authorised to abate something of this strictness in favor of natural equity..... *ib.*

5. The approval and formalities required in the homologation of an award, are only intended to make it executory, and not for the purpose of an examination on its merits..... *ib.*

6. The law providing for submitting causes to amicable compounders, whose award, if not impeached, is not subject to revision by the courts, is not unconstitutional..... *ib.*

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1. Where an appeal was taken from a parish in the Fourth Judicial District to the Eastern District of the Supreme Court at New-Orleans, and made returnable on the first Monday in January, when there was time to have returned it to the November term preceding: On motion of the appellee, the appeal was dismissed, as being irregularly taken.

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2. An agreement of the appellee endorsed on the record, that the cause be postponed to the next term for trial, does not amount to a waiver of his exception to the irregularity of the appeal..... ..... *ib.* 14

3. In an appeal where security is given merely and expressly for costs, the execution of the judgment below is not suspended thereby; it is not a suspensive but merely a devolutive appeal.

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8. Where the wife was sued as heir, together with her husband, and the citation of appeal is directed to her alone, and only served on the husband: *Held* to be insufficient, and the appeal dismissed for want of legal citation.....*Lanoue* vs. *Read et als.* 112

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11. When the service of the process of appeal is defective and insufficient, the appeal will be dismissed on motion of the appellee..... *ib.*

12. Where two judgments are rendered in the same case, and the last is appealed from and decided to be a nullity, the right of appeal on the first judgment is suspended until the decision takes place, and an appeal may be taken within a year from that period, although more than a year has elapsed since signing the judgment appealed from.
Flint, Syndic vs. *Cuny et al.* 379

13. Where an appeal bond is executed for one-half more than the amount of the judgment appealed from, and filed within ten days after the rendition of such judgment, the appeal is suspensive as well as devolutive.
Bridge & Vose vs. *Merle & Co.* 446

14. The jurisdiction of the appellate court attaches, as soon as the appeal bond is filed, and the court *a qua* has no longer authority to take any steps in the case, except such as are necessary to transmit and bring up the record. *ib.*

15. An appeal must be made returnable within the next term of the Supreme Court, if there be time to cite the appellee; if not, then to the subsequent term thereafter; but the judge *a quo* cannot, by a second order, extend the return day of the appeal, on the ground that the first day fixed is not a judicial day..... *ib.*

16. When the term to which a cause is made returnable fails, the appellant may well file the transcript at the next term, within the *three judicial days after the return day;* but the citation must be regular to the return day, and the service in due time..... *ib.*

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17. The Supreme Court, in its discretion, will refuse damages as for a frivolous appeal, even when the grounds of defence are untenable, and when the principles upon which they rest, have been settled by previous adjudication.....*Barbarin* vs. *Daniels*, 479

18. When the record furnishes no point, on which the appellant could reasonably hope to obtain the reversal of the judgment on appeal, it will be affirmed, with ten per cent. damages and costs.....*Menard* vs. *Cox*, 167

19. The service of citation of appeal, on the attorney at law of the appellees, when it is admitted the latter are residents of the parish where suit is brought, is illegal, and the appeal will be dismissed.
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20. Where the judgment appealed from is not signed, the appeal will be dismissed with costs.....*Wright* vs. *M'Nair et als.* 512

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3. The three days, after the expiration of which the appellee is entitled to the clerk's certificate to that effect, if the record is not filed or cause shown, are *days of grace*, within which the applicant must file the record or show cause to the contrary..... *ib.*

4. After the expiration of the three days of grace, if the record be not filed or cause shown, the appellee has three alternatives: he may obtain the

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clerk's certificate and proceed to the execution of his judgment, or he may file the record and have judgment affirmed, and lastly have the appeal dismissed.....*Griffith et al.* vs. *Miner*, 344

5. But the appellant may bring up and file the record after the expiration of the three days of grace, and without showing cause, if the appellee has not availed himself of any of the alternatives allowed him within the three days..... *ib.*

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1. An attorney at law, who has obtained a judgment for his client, is not thereby authorised to receive a note and mortgage in satisfaction of said judgment.....*Greenwell & Wife* vs. *Roberts et als.* 63

2. A note and mortgage executed for the purpose of discharging a certain judgment, and made to the attorney of the plaintiff in the judgment, who shows no special authority to receive them in discharge thereof, will be declared illegal and null..... *ib.*

3. An attorney at law who receives, or is to receive a per centage on the amount of money he recovers, or a stipulated fee, is a competent witness to testify in his client's cause, and is not thereby disqualified on the score of interest, when that interest consists in his *honorarium*.

W. & D. Flower vs. *O'Conner*, 198

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1. Where a person assigns and transfers a surety debt, for a consideration expressed therein, subrogating his assignee to all his rights, and authorising him to recover the debt by all legal means: *Held*, that a discharge given by the assignee to the debtor, in pursuance of the assignment, was valid against the assignor and his vendee, even when the debt was not novated by the assignment, and never paid to the assignee.

Andrus et als. vs. *Chretien*, 318

AUCTIONEER.

1. It is the duty of auctioneers to receive the conditions of sale in writing, from the vendor, and to read and proclaim them in a loud and audible voice to the by-standers, and invite bids in conformity therewith.

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BAIL.

1. Where a surrender is made of the accused, into the custody of the law, even after forfeiture has been entered, and the State avails itself of it by trying the criminal, the bail are entitled to be discharged.

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1. The board of directors of the Commercial Bank of New-Orleans is required, by its charter, to consist of thirteen members, eleven to be chosen by the ordinary stockholders and two by the City Council, the city also being a stockholder: *Held*, that according to the charter there is no distinction amongst the directors in the board of which they are all members.

Prieur & Labatut vs. *President and Directors of the Commercial Bank*, 509

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1. Where the cashier of a bank refuses to pay a check for want of funds of the drawer, but at the same time advances the money to the bearer, it will be presumed the cashier paid his own money as a loan, which will authorise him to recover, in a personal action in his own name, against the borrower.....*Menard* vs. *Cox*, 167

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1. According to the act of the legislature, passed the 13th March, 1827, concerning *protests of bills and notes*, whenever the notary certifies that, after diligent inquiry for the residence of the party intended to be charged by notice, he is unable to find it, and has lodged the notice in the nearest post office, addressed to him at the place where the contract was made, it is deemed equivalent to personal notice.....*Preston* vs. *Daysson et als.* 7

2 The holder of a bill or note ought not to avail himself of the ignorance of the notary as to the residence of the endorsers, in giving them notice of protest; if he knows, he must disclose their residence, or his neglect will discharge the endorsers..... *ib.*

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3. Error and want of consideration in executing a note, and a mortgage to secure it, are sufficient causes and grounds on which to sustain an injunction against an order of seizure and sale on such note and mortgage.

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4. The consideration of a note and mortgage, and the fact charged that they were executed in error, may be inquired into in an injunction to stay an order of seizure and sale; and if true, this summary proceeding will be declared illegal and the injunction perpetuated..... *ib.*

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7. In an action on an account current, founded on a long course of commercial transactions between the parties, in which payments are charged for sums paid to take up drafts or bills accepted by the plaintiff, the possession of the draft by the acceptor is *prima facie* evidence of the payments charged in the account, and may be given in evidence in support of items in the general account..... *ib.*

8. Where the day of payment of a note is past, at the time of its transfer, it is a sufficient warning to whoever receives it, that the maker may have some just reason to withhold payment, as he has a right to any equitable defence after the transfer, which he might have successfully urged before.

Burroughs vs. *Nettles*, 113

9. A note payable on demand, may be sued on immediately or pleaded in compensation..... *ib.*

10. Where the payee of a prommissory note payable to order, transfers it in writing on the back of the instrument for twenty per cent. discount, it will be considered a sale, not an endorsement, at the risk of the purchaser; and such a contract is aleatory and not usurious.

Romero et als. vs. *Segura*, 307

11. The holder of a promissory note payable to order, and endorsed in blank by the payee, is entitled to recover on it; it being in the nature of a note payable to bearer.....*Walsh* vs. *Wells*, 337

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15. Where the maker of a note died on the last day of grace, the notary, on calling at his domicil, being informed of his death, protested the note for non-payment, and notified the endorser thereof: *Held*, that there was not a proper demand of payment sufficient to bind the endorser.

Toby vs. *Maurian*, 493

16. Demand must be made on the maker of a bill or note, or on his heirs or legal representatives, if he be dead, or the impossibility of making any demand must be shown, before a recovery can be had of the endorser..... *ib.*

17. The endorser of a note is not entitled to relief, on the ground of error or fraud, because the previous endorsement is a forgery committed by the drawer, unless he shows that such error was caused by the plaintiff, or that he participated in the fraud.....*Olivier* vs. *Andry*, 496

18. Whether the endorsement of a note was made for the accommodation of the drawer, or taken in the regular course of business, the holder can look to his immediate endorser, even if the endorsement preceding it is a forgery..... *ib.*

19. Every endorsement is essentially an original contract, equivalent to drawing a bill in favor of the holder, on the acceptor or obligor..... *ib.*

20. A note given in part payment of a contract for erecting certain buildings, secured by a mortgage on the ground, is negotiable, and it is no defence against it, either in the hands of the original or subsequent holder, that the buildings were not completed according to contract.

Chalaron vs. *Vance*, 571

21. The paraph of the notary *ne varietur* on a negotiable note, does not in any manner change the nature of its negotiability..... *ib.*

COLORED PERSONS.

1. Where colored persons have been treated with as free, in a certain transaction or compromise, their freedom cannot afterwards be questioned by the other party with a view of avoiding the contract, on the ground that they were slaves; much less for the purpose of depriving them of the common privilege of all parties to a contract, that of contesting its validity on the score of error and fraud.

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COMMISSIONS.

1. Where creditors agree to allow a syndic five per cent. commission, on the *real amount* he may have in his hands in the course of his administration, he is only entitled to a commission on the *amount of the moneys actually received* by him, and not on the amount of notes or property which came into his hands,.....*Prudhomme, Curatrix* vs. *Vienne's Estate*, 362

2. By the act of 1817, the commission of syndics cannot exceed five per cent.; and if the first syndic is allowed full commissions on the property which came into his hands, his successor to whom it is delivered for final distribution, would be entitled to nothing. ..... *ib.*

3. The 1676th article of the *La. Code*, relates only to executors, and restricts their commission to two and a half per cent. on the amount of the inventory, when they have had *seizin* of the whole estate. ..... *ib.*

4. Where the plaintiff has been allowed two hundred and fifty dollars, as a referee to adjust the accounts of an estate, he cannot recover of the syndic a commission on the amount of the estate so adjusted, when there is no evidence of any extraordinary services having been rendered by him.
Powell vs. *Sinnott*, 450

COMMUNITY.

1. Property which belongs to the matrimonial community of acquests and gains, may be seized and sold for the debts of the surviving partner, after the dissolution of the marriage, so far as the interest or one undivided half of the survivor is concerned, when no proceedings are had before the levy or seizure to make partition among the heirs.....*Cooney's Heirs* vs. *Clark*, 156

2. A community of acquests and gains, as such, ceases to exist at the moment of the death of one of the partners, with all the legal effects resulting from it. Each party is seized of one undivided half of the property composing the mass; and the surviving party cannot alienate the share not belonging to them.....*Broussard* vs. *Bernard et als.*, 216

3. If the survivor of a community of acquests and gains continues to administer it without provoking a partition, and is tacitly permitted to enjoy the common estate, he will be considered, except in cases where he may have a legal usufruct, as intermeddling, and his responsibilities will be those of a *negotiorum gestor*..... *ib.*

4. Property purchased by the husband after the dissolution of the community, by the death of his wife, becomes his sole property; but he is accountable for one half of the net revenues derived from the common property, after the death of his wife, and up to the time of making the inventory..... *ib.*

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COMPENSATION.

1. A claim on a commercial firm, cannot be pleaded in compensation or set off to a demand by one of the partners against the defendant.

Walsh vs. *Wells*, 337

2. Evidence of a claim in compensation and reconvention, will be rejected when the demand is not equally liquidated with the claim of the plaintiff.....*Fagot et als.* vs. *Porche*, 562

3. The liquidation of a partnership claim cannot be pleaded in compensation or reconvention, against a demand on a note of hand..... *ib.*

4. The absence of all connexion between two demands, is an insurmountable objection to a demand in compensation or reconvention..... *ib.*

CONTRACTS.

1. Where a contract is entered into while the party was a *femme covert*, and some act is done by her after she became a *femme sole*, by which she ratified it, it will be binding on her.....*Tucker* vs. *Liles*, 76

2. So where the defendant is sued on her note, executed while a *femme covert*, for part of the price of a tract of land, and she retains possession of the land after her husband died, it will be considered a ratification of the contract and binding on her..... *ib.*

3. Where the question is presented, whether a workman who sues on a contract for work and labor, can give evidence of the work really done and recover its value, although the job was not completed according to contract when the employer received the work in an imperfect state, and when sued on the contract, demands damages in reconvention for delay in doing the work, and for not having performed it in a workmanlike manner: *Held*, that this case is similar to that of *Loreau* vs. *Declouet*, 3 *Louisiana Reports*, 1; and that the evidence is admissible, and the employer having received the work, is bound to pay the value in the condition it is delivered.

Dyer vs. *Seals*, 131

4. The captain of a steam-boat, owned by several persons including the captain, has authority to contract for freight to be carried according to the usual trade of the boat; and all the owners are bound by such contract, even without their assent given.....*Porter* vs. *Curry et als.* 233

5. The captain as agent of a steam-boat, may make contracts to take effect *in futuro*, to carry freight according to the usual course of trade of said boat, which is binding on the owner..... *ib.*

6. Where the captain of a steam-boat contracts to carry certain freight at a future day, between the well known *termini* of his voyage, and fails or

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violates such contract, the owners of the boat are liable in damages, for all the loss sustained.....*Porter* vs. *Curry et als.* 233

7. A workman engages or contracts to furnish good work, but a merchant is not so bound.....*Barclay* vs. *Conrad et als.* 261

8. The provisions of the Code of Practice, article 72, relating to the discussion of property does not apply to contracts made before its enactment.
Guidry et als. vs. *Rees*, 278

9. The execution of a contract, according to its terms, and the intention of the parties, is more consonant to justice, law and equity, than the rescission of it and a condemnation in damages, when the contract remains entire, and there is no change in the situation of the parties.
Melançon's Heirs vs. *Duhamel et als.* 286

10. A bill of sale, executed in Kentucky, and valid under the laws of that state, which expresses the sale to be made for a *valuable consideration*, without fixing any price, of certain slaves in Louisiana, will be tested by the laws of the place where the contract was made, and being valid there, is good here as between the parties, although not made in conformity to the laws of this state.....*Hall* vs. *Mulhollan, Executor*, 383

11. A contract valid by the law of the place where it is made, as a general principle, is valid every where..... *ib.*

12. The signal for steam made by the captain of a vessel, on entering the mouth of the Mississippi river, does not confer on him the contract of towage with the first tow-boat coming along side. Up to the time when the ship is actually taken in tow, and the voyage commenced, the captain of the vessel is at liberty to change his mind and employ another boat.
Clark et als. vs. *Gifford et als.* 524

COURT OF PROBATES.

1. The Court of Probates will not entertain jurisdiction of a suit, against a curator of an estate, to recover the property which it is alleged has been irregularly sold, and especially, when the purchasers are not made parties.
Everett vs. *M'Kinney & Wife*, 375

2. The Probate Court cannot inquire directly into the title to real estate, though there are cases in which it may be done incidentally..... *ib.*

3. It is not enough to allege, that a defendant is curator of an estate, to give jurisdiction to the Court of Probates of the subject matter, not in itself of probate jurisdiction..... *ib.*

CURATOR.

1. The person making opposition to an application for the curatorship of a vacant succession, must state in writing the reasons why he claims the

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office in preference to the person demanding it, and that he has a better right than the party claiming the appointment, otherwise his opposition will be rejected with costs.....*Chew et als.* vs. *Flint, Curator, &c.* 395

2. A special agent or attorney in fact, of one or more creditors, cannot claim the curatorship of a vacant succession, over other creditors or strangers..... *ib.*

3. A transferee of claims against a succession for collection, is but a mandatory; and if the transfer is simulated, that is, a mandate in disguise for the purpose of obtaining a curatorship, it cannot operate to the prejudice of *bonâ fide* creditors..... *ib.*

4. The law requires applications for curatorship of vacant successions to be published in the gazette, as well as a notice at the door of the court house, and it is made the duty of the judge to make these publications. *ib.*

5. Publication of applications for curatorships is to operate as a constructive notice to all persons having a right to make opposition, and as in all cases of constructive notice, it must be strictly proved..... *ib.*

6. An entry on the minutes of the Probate Court, stating the fact, that a publication of an application for a curatorship was made, is not evidence of the fact, as relates to persons to be effected by such notice..... *ib.*

7. The party claiming the benefit of a publication of an application for a curatorship, is bound to show it was duly made..... *ib.*

8. The curator *ad hoc*, appointed at the institution of suit, is not entitled to a fee or an allowance which is to be taxed in the costs of suit and paid by the party cast. If he be an attorney, he may claim a fee as for professional services, or be allowed a remuneration for his services, to be paid in either case by the person, or out of his funds, whom he represents. *Hewet & Co.* vs. *Wilson et als.* 71

9. The act of the 11th March, 1830, abolishing the office of curator *ad bona* and *ad litem* to minors, does not apply in cases where curators were appointed before the promulgation of the act. If the first curator is removed, another must be appointed, although since the general law abolishing the office.....*Saulet* vs. *Girard*, 559

CUSTOM.

1. Customs result from a long series of actions constantly repeated, which by such repetition, and by uninterrupted acquiescence, acquire the force of a tacit and common consent.....*Broussard* vs. *Bernard et als.* 211

2. The particular custom "*that the community of property* continues after the death of one of the partners, until inventory is made," is required to be proved by other partitions and divisions, that may have been made in the same place, and that it has prevailed without interruption..... *ib.*

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3. The establishment of a custom necessarily admits proof, other than that required to establish laws .....*Broussard* vs. *Bernard et als.* 211

4. Parole evidence is inadmissible to prove the customs of a country..... *ib.*

5. The books and records in the parish judge's office are legal, and the proper evidence to prove a particular custom, in relation to the continuation of the community, after the death of one of the partners, until inventory is made..... *ib.*

6. Evidence consisting of extracts from the *procès verbal* of commandants and parish judges in Attakapas, for a long series of years, in which the phrase "*afin defaire cesser la communauté*" is used in the caption to inventories, with other phrases of similar import, is *insufficient* to prove the existence of a custom in such place, that a community of acquests and gains continued between the surviving husband and the heirs of his deceased wife, until inventory is made.....*Broussard* vs. *Bernard et als.* 216

7. No usage or custom of steam-boats and tow-boats, that the first coming along side of a ship on a signal made by her for *steam*, has thereby an absolute contract to tow the ship at an established rate, according to a custom and usage of the tow-boats, *is binding*, when such custom has only prevailed five or six years, among those having an interest in establishing it.....*Clark et als.* vs. *Gifford et als.* 524

DAMAGES.

1. Where there is no evidence of damages having been sustained, none can be recovered against a warrantor.....*Smith* vs. *Corcoran et als.* 46

2. The measure of damages and just criterion of loss to the owner, is the value of his property at the place of destination, after deducting freight.....*Porter* vs. *Curry et als.* 233

4. In an action for false imprisonment and damages under a *ca. sa.*, which was quashed for having illegally issued, the defendant may show in justification and mitigation of damages, by argument and reference to the decisions of the Supreme Court, that the judgment quashing the writ is erronenous, when at the trial such judgment has not become *res judicata*.

Escurix vs. *Daboval*, 575

DEBTOR AND CREDITOR.

1. Credits or other writings not signed, endorsed on the back of a note or act, which is in the possession of the creditor, and tend to liberate the debtor, and are crossed out or erased, must be considered as entitled to credit.....*Benson* vs. *Mathews*, 356

2. An erased credit on a note, in possession of the creditor, is not conclusive proof of payment, but may be repelled by other proofs or presumptions, to show it was endorsed on the note erroneously..... *ib.*

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3. So, where two credits, one of four hundred dollars, and one of three hundred and eighty dollars, were endorsed on a note in the possession of the creditor, and the former was erased, both endorsements appearing to be made on the same day: *Held*, that the erasure was proper and the credit erroneously endorsed, when, on weighing the presumptions arising from all the circumstances of the case, they preponderate in favor of the creditor.

Benson vs. *Mathews*, 356

DEMAND.

1. No recovery can be had of the endorser, until demand of payment has been made on the maker of the note, or on his heirs or legal representatives if he be dead, unless the impossibility of making such a demand is shown..... ...*Toby* vs. *Maurian*, 493

DEPOSITION.

1. When the notice to take a deposition is not given in full time, as required by law, yet when the party sends her attorney to the commissioner, who appears and objects to taking it on the ground of defective notice, this fact will render the notice sufficient.

Beale and Wife vs. *Brandt and Wife*, 583

2. Where the name of a witness is written *C. Swabine* in the affidavit for the commission, and *Catherine Swab* in the deposition, the discrepancy in the names will not vitiate the deposition, when it is in other respects taken according to law..... *ib.*

3. The law does not require a commissioner, before whom a deposition is taken, to reduce it to writing personally. It is sufficient, if not written by the witness, that it be reduced to writing by any indifferent person..... *ib.*

4. When a deposition is accompanied by the certificate of the commissioner, that it was taken by him, and signed and sworn to before him, it is a sufficient *procès verbal* of the manner of taking it..... *ib.*

DEPOSIT IN COURT.

1. Where the plaintiffs and intervening parties unite in a prayer, that the defendant be condemned to pay the sum demanded, and his *liability* is established, he will be required to deposit the money in court, to abide the final decision between the claimants.

Hermann & Son vs. *Louisiana State Insurance Company*, 502

DISCUSSION.

1. The Civil Code of 1808, art. 44, p. 462, and p. 430, art. 10, provides, that the third possessor of mortgaged property, who is not personally liable for the debt, may require the property in possession of the original debtor,

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to be first discussed and sold, before coming on him, if the debtor is not situated in too distant a part of the State.....*Guidry et als.* vs. *Rees*, 278

2. According to the Code of Practice, art. 72, the discussion of property, not situated within the jurisdictional limits of the tribunal where payment is to be made, is disallowed..... *ib.*

3. It is not necessary that the money required to defray the expenses of discussion of property be tendered at the time of filing the plea; it is sufficient if the money be deposited in court, in pursuance of an order directing it to be done within a specified time..... *ib.*

4. The provisions of the Code of Practice, limiting the right of discussion to property within the jurisdictional limits of the tribunal where payment is to be made, does not apply to contracts made before its enactment..... *ib.*

5. The Code of Practice has re-enacted the same general rules in relation to the discussion of property by creditors having a general mortgage on the property of their debtors, as was provided by the act of 1817, requiring them to proceed against the property last sold, and ascending to the first until their claims be satisfied.....*Patin et als.* vs. *Prejean et als.* 301

6. The means by which a minor's rights against the property of his tutor are to be enforced, are always in the power of the legislature. In requiring him to discuss property last alienated, before coming on that previously sold, although the law was enacted after his mortgage attached to the property of his tutor, yet it was within the constitutional power of the legislature to pass it..... *ib.*

DIVORCE.

1. A suit for a separation from bed and board, is in the terms and meaning of the law, an *action of divorce*.....*Savoie* vs. *Ignogoso*, 281

2. The exception to the rule of evidence contained in the 2260th article of the Louisiana Code, by the third section of the act of 1827, relative to divorces, is not restricted to either species of divorce, but applies to both. *ib.*

3. The action for a separation of bed and board, in all cases leads to a divorce *a vinculo matrimonii*..... *ib.*

4. The children and relatives of the plaintiff, are competent to testify in her behalf in an action for a separation of bed and board..... *ib.*

ENDORSER.—SEE BILLS OF EXCHANGE AND PROMISSORY NOTES.

EVICTION.

1. If in case of eviction of part of the thing, the sale is not cancelled, the value of the evicted part only is to be reimbursed according to its estimate, proportionably to the total price of the sale.

Smith vs. *Corcoran et als.* 46

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2. Where judgment of eviction is obtained against the purchaser of a tract of land, while suit is pending for the price, and the purchaser calls the plaintiffs (his vendors) in warranty, to protect his title, and at the same time pleads the eviction, asks a rescission of the sale and a discharge from the contract; when there is no evidence of an actual dispossession or ouster of the defendants, either forced or voluntary, the plaintiffs will recover the price, on preventing the execution of the judgment of eviction, by tendering to the defendants and vendees, a renunciation of all the benefits and advantages under it, by the person who obtained it.

Melançon's Heirs vs. *Duhamel et als.* 286

3. The third possessor who is evicted, is entitled to recover of his vendor and warrantor, the value of his improvements put on the evicted premises, at the period of eviction.....*Babin's Heirs* vs. *Winchester*, 460

EVIDENCE.

1. The notary's certificate, stating that due diligence was used to find the residence of an endorser, intended to be charged by notice of protest, but in vain, and that the notice was deposited in the post-office, addressed to him, must be taken as *primâ facie* evidence of these facts.

Preston vs. *Daysson et als.* 7

2. The nature and degree of diligence used to find the residence of the party, on whom notice of protest is to be served, may be inquired into, and if in point of fact, due diligence was not used to obtain the necessary information, the presumption arising from the notary's certificate, will yield to contrary evidence.....*ib.*

3. The statute of the 13th March, 1827, concerning protests of bills and notes, does not change the rule requiring due diligence to be used, but provides a new mode of proof of such diligence..... *ib.*

4. Evidence offered to prove the identity of a tract of land, and to correct errors in its description, is properly rejected as superfluous, when its identity is admitted in the pleadings.....*Smith* vs. *Corcoran et als.* 46

5. In a suit by a firm for the restitution of stolen goods in damages, where the wife is a party plaintiff, the acts and declarations of her husband in relation to the matters in contest, in which he took an active part, are admissible in evidence, as forming a part of the *res gesta*. He must be regarded in this case, as representing his wife with the consent of her partner.....*Hewet & Co.* vs. *Wilson et als.* 71

6. Where drafts are charged in an account current as paid to *Guay*, and those offered in evidence are payable to *Gray*, and the amounts and dates of the drafts correspond with those charged in the account, they will be rendered in evidence.....*Bell* vs. *Norwood, Administrator*, 95

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7. The repossession of a note, once specially endorsed by the payee, is not evidence of title to it, but it is if the transfer is made in blank.
Bell vs. *Norwood, Administrator*, 95

8. Parole evidence to prove an agreement to pay interest at ten per cent., is clearly illegal and inadmissible..... *ib.*

9. Accounts and letters relative to sales made by the plaintiff, and rendered to the defendant, anterior to the date of the first item of the account sued on, are admissible in evidence, because it may also be shown, that a subsequent settlement took place, and the moneys arising from such sales were accounted for..... *ib.*

10. In a suit by the transferee against the maker of a note, where the answer alleges fraud and collusion between the payee or transferor and the plaintiff, parole evidence of the acts of the former, is clearly admissible against the latter, if the collusion is established.....*Burroughs* vs. *Nettles*, 113

11. And where the jury are to pass at once on the plea of collusion, and acts of the transferor charged with colluding with the plaintiff, the evidence relating to these two points must be administered simultaneously..... *ib.*

12. The promise of the vendor of a slave, to rescind the sale on account of redhibitory vices, is admissible in evidence, in a suit between the transferee of a note and the maker, given for the price of the slave, to show the existence of redhibitory defects..... *ib.*

13. On the score of irrelevancy, the objection to evidence is seldom of any avail in the Supreme Court..... *ib.*

14. In an action of revendication for the recovery of a slave by the heirs, as forming part of their ancestor's succession, against the defendant, who holds the slave by written title from said ancestor, parole evidence is inadmissible to prove the defendant directed the slave in question to be inventoried as part of said succession, in order to make out plaintiff's title.
Bradford's Heirs vs. *Clark*, 147

15. Where parole evidence is offered with a view to defeat the defendant's written title to a slave, it should be rejected as inadmissible..... *ib.*

16. Where heirs claim certain slaves allotted to them in the partition of their ancestor's estate, the *procès verbal* of partition is admissible in evidence to show title on the part of the claimants.....*Cooney's Heirs* vs. *Clark*, 156

17. Parole evidence is inadmissible to supply defects in the sheriff's return, of proceedings under an execution, or where it contradicts the official return of the officer.....*Heirs of Kimball* vs. *Heirs of Lopez*, 173

18. The affidavit of the party is insufficient to establish the loss of a note, but it is admissible in evidence as the basis of other proof, either positive or circumstantial.....*W. & D. Flower* vs. *O'Conner*, 193

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19. In a cross-examination of plaintiff's witness the defendant cannot require him to detail declarations of the defendant made out of the presence of the plaintiff, and which make evidence against him, or in favor of the defendant. .....*W. & D. Flower* vs. *O'Conner*, 198

20. In a petitory action, where the defendants, their vendors and warrantors pleaded, 1st. The general issue; 2d. Prescription, by thirty years uninterrupted possession; 3d. Prescription, by more than ten years possession under a *just title and in good faith;* 4th. Silence of the plaintiffs for more than forty years in not asserting their title; and in support of these pleas, offered the *testimony of witnesses* to prove and make complete their chain of title, which was objected to by the plaintiffs; 1st. Because the defendants having admitted in their pleadings, that they had a written title, must produce it, or account for its loss; 2d. Parole evidence cannot be received to prove title to land, or even its assessment for taxes; 3d. Because the object is to prove a reputation of title to land, which cannot be done, and being admitted: *Held*, that this evidence is illegal and inadmissible; and being admitted absolutely, the District Court erred, because it is to judge of the admissibility of testimony and cannot discharge itself from this obligation by transferring it to the jury. It must be satisfied that the best evidence cannot be had before it admits inferior.....*Davis's Heirs* vs. *Provost's Heirs*, 274

21. The record of a suit between other parties, evicting the third possessor, is legal evidence in an action by the third possessor against his vendor, to prove the fact of eviction, and the damage sustained by him in consequence thereof,.....*Key* vs. *Walker*, 297

22. Where the petition alleges the plaintiff was evicted by a certain suit between two other persons, and refers to it by name and description, it is a sufficient allegation to authorise the admission of the record in evidence, in an action against the vendor for damages..... *ib.*

23. It is not necessary that the vendor who is sued, had notice of suit and proceedings evicting his vendee, to authorise the admission of these proceedings in evidence against him. That matter may go to the effect of the evidence, but not to its admissibility..... *ib.*

24. Parole evidence is *inadmissible* to prove a verbal agreement to cancel a sale of slaves, or to establish or destroy title to slaves.

Andrus et als. vs. *Chretien*, 318

25. But parole evidence is admissible to prove collateral facts, such as that the seller took back certain slaves from the purchaser, and had them in possession, with the consent of the latter, in consequence of redhibitory defects, and to avoid litigation..... *ib.*

26. Parole evidence is admissible to prove the declarations of a vendor in relation to the redhibitory vices of slaves, at or before the sale.

Hawkins vs. *Brown et al.* 417

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37. The conversations of by-standers at a probate sale, with a purchaser, by which he is apprised of redhibitory defects or vices in the property, before it is bid off, will not be received to exclude the legal warranty resulting therefrom, unless they go to establish the fact, that the redhibitory vice complained of, had been declared by the vendor.

Hawkins vs. *Brown et al.* 417

28. The crier's declarations at a probate sale, unauthorised by the vendor, are not admissible in evidence to show the buyer was thereby apprised of the redhibitory vices, before he bid for the property..... *ib.*

EXCEPTIONS.

1. A peremptory exception may be pleaded, after the cause has been remanded for a new trial.....*Williams* vs. *Bethany*, 92

2. According to the 420th article of the Code of Practice, an amendment of the answer, after issue joined, may be made by adding new exceptions, provided they be not of the dilatory kind..... *ib.*

3. So, in an action for the recovery of rent, on the lessee's holding over after the case has been remanded, he may oppose the exception, that after the expiration of the lease he tendered the possession of the premises..... *ib.*

4. The exception or plea that no amicable demand was made, must be specially pleaded, and *in limine litis*. It is too late to put in the exception after *contestatio litis*.....*Coon* vs. *Brashear et als.* 265

EXECUTOR.

1. The executor is bound to administer on all the property of a succession which is expressly declared in a will, by the testator, to form a part of his estate; even on property claimed by an adverse title, unless inhibited by competent authority.....*Grounx et als. f. p. c.* vs. *Abat's Executor*, 17

2. Where an executor is appointed and directed in the will to sell the property of the testator, and deliver the residue of the proceeds to the heir, he is authorised to take possession and sell it without the seizin of the estate being expressly given.....*Dunlap* vs. *Bailey, Executor*, 368

3. The executor derives his power from the will; is primarily the representative of the deceased, and not of the creditors of the succession, when it is not shown to be insolvent; and he is required to account to the heirs and not to the creditors.....*Hall* vs. *Mulhollan, Executor*, 383

4. The executor, although he is a creditor of the estate he administers, has no right to withhold property or slaves found in the succession, from the vendee by a valid title, but which have not been delivered without some right or lien acquired in virtue of judicial process..... ..... *ib.*

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FACTOR AND AGENT.

1. The circumstance of a factor being the creditor of the consignor or owner, and the necessity of having his advances covered, will not, of itself, justify a sale below the limited price.....*George* vs. *M'Neill et als.* 124

2. So, where twenty bales of cotton were consigned, the sales limited at nine and one-half cents, or *more*, and without further instructions, the factor or agent sells at seven and eight and one-half cents per pound; and it is proved that a higher price than that at which the cotton was sold, could not be obtained; and when it also appears that this was the highest market price obtainable at any time between the sale and the inception of suit, the price at which the cotton actually sold, is all the owner can recover..... *ib.*

3. In an action by the principal against his factor, to account and pay over a balance for merchandise sold on consignment, it devolves on the latter to show he has not received any money by the sale of the goods, or collected any of the debts, and to establish this to be the case, *without his fault*, in order to avoid being liable.....*Delpeuch* vs. *Dufart*, 533

FRUITS AND REVENUES.

1. The allowance made by the jury to the defendants, for their improvements show they were possessors in good faith; and consequently the plaintiff is not entitled to the fruits and revenues of the land.

Greenfield vs. *Manning et als.* 56

GUARANTY.

1. A letter of guaranty must be strictly construed, in order to charge the guarantor: so where A recommended B to the credit of C. and the latter made the advances to B and D as a firm, on the faith of the guaranty: *Held*, that the guarantor is not bound thereby.

Bell vs. *Norwood, Administrator*, 95

HEIRS.

1. The heirs of the deceased wife, who dies without leaving descendants, have a right at once to demand her paraphernal estate, without waiting for a settlement and liquidation of the community of acquests and gains, with the surviving husband.....*Robin et als.* vs. *Castille*, 292

2. When the wife dies, her *heirs* are seized of all the effects constituting her separate estate, from the moment of her decease..... *ib.*

HUSBAND AND WIFE.

1. Where the evidence establishes that the wife was in the habit, with the knowledge of her husband, and accustomed to make purchases for the

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use of the family, and he did not object thereto, but had often paid such bills, he will be still bound to pay the amount of such purchases.

Chaix vs. *Villejoin*, 276

2. Money received by the husband during marriage, on account of his wife, does not fall into the community, but remains her separate property. ....*Robin et als.* vs. *Castille*, 292

3. The wife, during the existence of the community between her and her husband, has a right to resume the administration of her paraphernal property..... *ib.*

INJUNCTION.

1. Where it appears that the plaintiff in execution, was prevented from making his debt out of the property seized, by the wrongful suing out an injunction, the surety in the injunction bond is liable in damages, for an amount not exceeding the penalty of the bond.....*Day* vs. *Martin*, 365

2. Although a judgment enjoined draws interest until paid, the claim of the plaintiff against the surety in the injunction bond, is for damages not liquidated, which do not carry interest, and cannot exceed the penalty of the bond..... *ib.*

INSOLVENT.

1. The acceptance of a surrender of property of an insolvent debtor, by the judge, vests all the debtor's rights in the creditors, which cannot be divested or set aside, unless by proceedings of a single creditor, had contradictorily with the mass of the creditors...*Morgan* vs. *His Creditors*, 60

2. Until a syndic is appointed, either by the court or the creditors, no motion or suit to dismiss the petition of the insolvent, can be made or tried. *ib.*

3. The ceding debtor, after surrender and appointment of syndics, has no longer any capacity to appear in court, in relation to the property surrendered.....*M'Intire* vs. *Whiting*, 271

4. But where a ceding debtor has a qualified property in goods, acquired after the surrender as bailee or carrier, which are seized by a judgment creditor, he has a right to move the court, and have the writ and seizure annulled and set aside..... *ib.*

5. Property belonging to the ceding debtor, at the time of the surrender, cannot be seized in execution by a judgment creditor, who is a party to the *concurso*..... *ib.*

6. The District Court, on motion by an insolvent debtor, has the right to quash an execution, which improvidently issues contrary to the order staying proceedings; the debtor, although incapable of appearing in court,

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in relation to the mass of property surrendered, was a party to the original suit, and might well make such a motion.....*M'Intire* vs. *Whiting*, 271

7. An absconding debtor cannot apply for the benefit of the insolvent laws, and make a surrender of his property by *attorney in fact*. No man can swear by proxy, unless expressly authorised by law; and the attorney in fact cannot swear, that no part of the insolvent's property has been diverted to the injury of his creditors, which is essential to the affidavit.

Foucher vs. *His Creditors*, 425

8. The judge is not authorised to order a stay of proceedings, either against the person or property of an insolvent debtor, and to accept the cession, so as to bind all the creditors without a compliance on the part of the insolvent, with the essential forms of law..... *ib.*

9. A person owning a saw-mill and brick-yard, as an appendage to a sugar plantation, and selling the bricks and plank, does not constitute him *a trader*, within the meaning of the 6th section of the act of 1826, relating to forced surrenders of property..... *ib.*

10. A married woman, separated in property from her husband, and who is not even a public trader or merchant, has the right to claim the benefit of the insolvent laws, which authorise a cession of property for the benefit of creditors, by a debtor in embarrassed and insolvent circumstances.

Madame Gottschalk vs. *Her Creditors*, 436

INSURANCE.

1. Where A takes out a policy *for whom it might concern*, takes in a partner in the ownership of the vessel insured, and afterwards transfers the policy by special endorsement in his individual name to the plaintiffs, who show a total loss, payment of the loss to them, will liberate the underwriters. They contracted with A, and whether as principal or agent is immaterial.

Hermann & Son vs. *Louisiana State Insurance Company*, 502

INTERDICTION.

1. The law presumes certain formalities which must be pursued, in order to obtain a judgment of interdiction against a person above the age of majority.....*Babineau, Curator, &c.* vs. *Bendy & Dugat*, 248

2. The law presumes every person above the age of majority, capable of managing his own affairs, even deaf and dumb persons not excepted..... *ib.*

3. Where a person has not been interdicted in pursuance of law, but being deaf and dumb, and a curator appointed to manage his affairs, such curator cannot claim a legal mortgage on the real estate of another, who has intermeddled and collected moneys due said deaf and dumb person..... *ib.*

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INTEREST.

1. When the sum found by the jury, was not liquidated at the inception of the suit, interest is not allowable by law. The law does not allow interest on unliquidated sums.....*Dyer* vs. *Seals*, 131

2. Where the verdict and judgment allows interest on an unliquidated sum, the appellee cannot avoid a reversal of the judgment and payment of costs, by filing in the Supreme Court, a *remittitur* of the interest so allowed..... *ib.*

3. Conventional interest, whether stipulated in *eo nomine*, or in the shape of a penalty, cannot exceed ten per cent.
Reynolds, Byrne & Co. vs. *Yarborough*, 188

4. An error in calculating the highest rate of interest, by which it exceeds the legal amount of conventional interest, will not be considered as charging usurious interest.....*W. & D. Flower* vs. *O'Conner* 198

5. Usury may be shown even when not pleaded, if it appears from the petition or evidence offered by the plaintiff, that more than ten per cent. was stipulated..... *ib.*

6. A judgment stayed by injunction, draws interest until paid; but the claim of the plaintiff against the surety in the injunction bond, is for damages *not liquidated*, which do not carry interest.....*Day* vs. *Martin*, 365

7. A mortgage which, without reciting the interest, refers to and secures the payment of a note, is evidence of the principal obligation, and covers all the stipulated interest therein.....*Barbarin* vs. *Daniels*, 479

8. Where a note stipulated for ten per cent. per annum interest, and was made payable eighty-five days after date: *Held*, that the interest run from the date of the note, without any demand at maturity, until final payment..... *ib.*

9. The writing is not of the essence of an agreement to pay interest at ten per cent., but that the legislature only intended to exclude testimonial proof of such agreement.....*Cox* vs. *Mitchell*, 520

10. The defendant in an execution is subject to no interest, simple or compound, after the adjudication of his property, whether on a credit or for cash.....*Hilligsberg* vs. *Holmes*, 565

11. Judgment will be reversed where interest is allowed, on an unliquidated claim.....*Featherstone* vs. *Robinson*, 596

INTERROGATORIES.

1. A party who propounds interrogatories to be answered in open court, but neglects to have a day fixed, waives his right to have them taken *pro confesso*, if they be not answered.....*Comvton et als.* vs. *Pearce*, 333

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2. Either party has the right of having his interrogatories answered in open court and in his presence. No order of court is necessary, as it is a right the law gives.....*Compton et als.* vs. *Pearce*, 333

3. The Code of Practice requires the answer to be made when both parties are in court, and as the answer is for the benefit of the party provoking it, he should take the means required by law, and have the day fixed..... *ib.*

4. In an action on the balance of account due, the plaintiff has a right to interrogate the defendant, touching the agreement of the latter to pay conventional interest.....*Cox* vs. *Mitchell*, 520

5. Where the defendant neglects to answer interrogatories annexed to the petition, the facts required to be disclosed, ought to be taken as confessed... *ib.*

INTERVENOR.

1. An intervenor in a suit commenced by attachment between the original parties, although he succeeds in obtaining judgment, cannot proceed on the attachment bond, against the surety for any supposed damages, because he is no party thereto.....*Raspillier* vs. *Brownson*, 231

2. There is no privity of contract between the intervenor in a suit already begun by attachment, and the surety in the attachment bond, and he cannot avail himself of the penalty..... *ib.*

JURY.

1. Where a witness swears falsely on a material point in a cause, the jury is authorised to disregard his testimony altogether.

Coon vs. *Brashear et als*, 265

2. The jury are the judges, whether a misstatement by a witness was wilful or material, and what degree of credit ought to be given to his testimony..... *ib.*

JUDGMENT.

1. Where a suit is brought against A, for illegally retaining possession of a note, and against B the obligor, included in the same suit, and judgment is asked against the first, to compel a surrender or payment of the note, and the latter also for its amount, the causes of action are different, and judgment may well be taken against the first, while the case is continued as to the latter.....*Regillo & Bryan* vs. *Lorente et als*, 140

2. The neglect or omission to record a judgment, within *ten* days after its rendition, under the recording act of March 26, 1813, does not render it a

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nullity, so as to prevent its having the effect of a legal mortgage from the date of its registry, when recorded after the lapse of ten days.
Gayle's Heirs vs. *Williams's Administrator*, 162

3. When the defendant suffers judgment by default to be taken against him, it is a presumption, that by his silence he acknowledges the justice of the plaintiff's demand.....*Lopez et als.* vs. *Bergel*, 178

4. Where the defendant does not deny the plaintiff's debt, but lets judgment go by default, this fact will be considered as a corroborating circumstance, which taken with the testimony of one witness, is sufficient proof of the demand to make such judgment final..... *ib.*

5. A judgment rendered by a court of competent jurisdiction, between parties legally before it, cannot be questioned indirectly and collaterally.
Broussard vs. *Bernard et als.* 216

6. While a judgment remains in force and unappealed from, the rights of the parties are concluded by it, leaving to those under age their legal recourse..... *ib.*

7. A judgment by default made final, will not be set aside for an answer to the merits, when the defendant can show nothing in his favor, but his own *laches* and their fatal consequences.....*Small* vs. *Flint & Thomas*, 352

8. If a judgment be in itself vague and uncertain, it may be rendered certain by reference to the pleadings.....*Williams* vs. *Kelso*, 406

9. According to the rules of practice in force in 1816, which was before the adoption of the Code of Practice, a judgment by default became final *ipso facto* by the lapse of three days; and reasons were not necessary to the validity of such a judgment .....*Babin's Heirs* vs. *Winchester*, 460

10. A judgment by default, which becomes final by operation of law, does not require the signature of the judge to render it perfect and final... *ib.*

11. Where a judgment was rendered by default, and signed according to law, after the cause was set down for trial and the defendant notified thereof, he cannot afterwards obtain relief, by having the judgment set aside, and the cause tried *de novo*.....*Borée, f. m. c.* vs. *Kellar*, 500

12. Where the decision of a case depends wholly on matters of fact, and when, on an examination of the testimony, it warrants the verdict of the jury, the judgment rendered thereon will not be disturbed.
Kimball & Lilly vs. *Nicholson*, 529

JURISDICTION.

1. The judiciary act of 1789, while it gives to the federal courts exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction,

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reserves to parties, in all cases, the right of a common law remedy, when the common law is competent to give it.....*State* vs. *Judge Watts*, 440

2. The states are prohibited from establishing courts, having cognizance of cases of admiralty and maritime jurisdiction, according to the course of proceedings in courts of admiralty; but if parties choose to sue upon their contracts, according to the rules of practice established by law in courts of general jurisdiction, instead of proceeding summarily, by motion or *in rem*, in the admiralty courts, there is nothing in the constitution which prohibits them..... *ib.*

3. The adjustment of accounts among part owners of ships, relating to profits, is matter of chancery and not admiralty jurisdiction in England. *ib.*

4. Admiralty courts in the United States, may, in some cases, have ordered the sale of vessels, at the suit of part owners, but it does not follow, as a necessary consequence, that the state courts are without jurisdiction in the same matters..... *ib.*

5. So the part owner of a vessel, within the jurisdiction of the state courts of general jurisdiction, may institute suit therein, to compel a partition of his interests, and recover a balance for advances made, by a judicial sale or licitation of the vessel, even when the co-proprietor resides out of the state..... *ib.*

6. In a suit, claiming of the defendants the right to exercise an office withheld from them, the plaintiffs, with a view of securing the right to appeal, in case the judgment is adverse to their pretensions, may claim damages to an amount sufficient to give the appellate court jurisdiction.
Prieur & Labatut vs. *President and Directors of the Commercial Bank*, 509

LAW.

1. In a conflict of laws between two states, where a testator in Georgia bequeaths to certain of his slaves their freedom, and it is shown that the laws of Georgia prohibited the manumission of slaves, except by application to the legislature; in a suit in this state to recover their freedom under the will: *Held*, that the *bequest* in the will being made in contravention of the law of the state where the testator resided, is *null and void;* and that the slaves do not, *ipso facto*, become free under the will, when removed to this state.....*Mary, f. w. c.* vs. *Morris et als.* 135

2. The *Fuero Real* of Spain, was not in force in Louisiana, in 1816.
Broussard vs. *Bernard et als.* 216

3. The Spanish law having been in force in Louisiana until the repealing act of 1828, the court will recognise it in relation to cases arising under the government of Spain, without requiring it to be proved as a fact.
Berluchaux vs. *Berluchaux et als.* 539

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4. The effect of laws is generally prospective; and if they have a retrospective effect in any case, the intention of the legislature must be clear and express. It cannot command obedience to laws effecting the obligation of contracts entered into before their passage.....*Guidry et als.* vs. *Rees*, 278

5. A right or title acquired under a contract, cannot be modified or affected by any subsequent law of the legislature; but the remedy or means given by law, to enforce those rights, are always in the power of the legislature, who may extend or restrict them as circumstances may require.
Patin et als. vs. *Prejean et als.* 301

6. Statutes in *pari materia* should be construed together, in order to ascertain the meaning of the legislator.
Gayle's Heirs vs. *Williams's Administrator*, 162

7. Prior laws are not repealed by subsequent ones, unless by positive enactment, or clear repugnancy in their respective provisions..... *ib.*

LEGATEES.

1. Persons claiming as legatees under a will, cannot set up title to property under an anterior sale and conveyance, which is expressly declared in the will to form a part of the estate of the testator.
Grounx et als. f. p. c. vs. *Abat's Executor*, 17

LETTING AND HIRING.

1. Where a person borrows the slave of another, to do a certain work for him, and through his neglect or imprudent conduct the slave dies, he will be bound to pay his value to the owner.....*Niblett* vs. *White's Heirs*, 253

2. So where A borrows the slave of B, to haul a load seven or eight miles, and a storm comes on, and the borrower refuses to stop and take shelter for himself and the slave, and the latter is lost, A will be answerable to B in damages for the value of the slave..... *ib.*

MANDATE.

1. A mandatory is not considered to have exceeded his authority, when he has fulfilled the trust confided to him, in a manner more advantageous to his principal, than that expressed in his appointment.
George vs. *M'Neill et als.* 124

2. A transferree of claims, against a succession for collection, is but a mandatory; and if the transfer is simulated, that is, a mandate in disguise for the purpose of obtaining a curatorship of the estate, it cannot operate to the prejudice of *bonâ fide* creditors.....*Chew et als.* vs. *Flint, Curator*, 395

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3. An attorney in fact, or special agent of one or more creditors, cannot claim the curatorship of vacant successions, especially over other creditors or strangers. .....*Chew et als.* vs. *Flint, Curator*, 395

4. The mere legal agent appointed to sell property by authority of law, has no powers but those conferred by law.....*Hawkins* vs. *Brown et al.* 417

MASTERS OF VESSELS.

1. Where a passenger engages his passage on deck or in the steerage, and in consequence of continued intoxication and ridiculous conduct, is made the butt and ridicule of the other passengers, without the interference of the master of the vessel, the latter is not liable in damages for such treatment during the voyage.....*Hessian* vs. *Ferguson*, 531

MASTER AND SLAVE.

1. Where offences are committed by slaves belonging to several masters, by their order, they will be liable as direct trespassers *in solido*.

Hart & Co. vs. *St. Romes et als.* 586

2. But where the slave of A, in company with the slaves of B, commit an offence, it is clear that A cannot, according to the *Louisiana Code*, be made responsible beyond the value of his slave, if he thinks proper to abandon him..... ..... *ib.*

3. After the master abandons his slave, he still retains a residuary interest, that if the sale of him produces more than the amount of the damages awarded, he is entitled to the surplus..... *ib.*

4. The master is not *in mora* in making an abandonment of the slave until three days after the judgment. Until the judgment is *res judicata*, the party has not lost his right of liberating himself by abandonment; or if the abandonment becomes impossible by a fortuitous event, without the fault of the master, he is liberated..... *ib.*

5. Where several slaves, belonging to different masters, commit a theft, the masters should be condemned to pay in proportion to the number of slaves respectively who were accomplices in the theft..... *ib.*

6. So, where A was the owner of three out of five slaves concerned in a robbery, he is liable to pay three-fifths of the value of the stolen goods..... *ib.*

MINORS.

1. A transaction entered into on the part of minors, duly represented and made according to the forms of law, will cure defects in a judgment which was not conclusive, and against which the minor might otherwise be relieved.....*Grounx et als. f. p. c.* vs. *Abat's Executor*, 17

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2. Where the curator *ad bona* of a minor above the age of puberty, purchased property for the use and in the name of his ward, at the sale of his father and mother's estate, and during his minority, in an action of partition, he is charged with his share of the estate thus purchased and received, by a judgment of the Probate Court: In an action to set aside the purchase, as having been made without his concurrence and consent: *Held*, that he was precluded by the judgment of the Probate Court so long as it stood unreversed.....*Grounx et als. f. p. c.* vs. *Abat's Executor*, 17

3. Where the price of minors' property has been received by their tutor, and placed to their credit on a tableau of distribution of the testator's estate, which is homologated by a judgment of the Probate Court, and is unappealed from, the minors are precluded from setting up title to the property itself, so long as the judgment of homologation subsists, showing they have received the price..... *ib.*

4. Judgments rendered by courts of competent jurisdiction, against minors duly and legally represented, so long as they are not reversed or declared null, have the same force and validity as if the parties were of full age..... *ib.*

5. Where the creditors of an insolvent succession, in which there are minors interested, and who have accepted it with the benefit of inventory, meet and concur with a family meeting in behalf of the minors, that the property be sold on certain terms and credits, the sale will be legal and confer a valid title on the purchasers, even if it sell for less than the appraised value.....*Towles's Administratrix* vs. *Weeks et als.* 312

6. A sound interpretation of the law in relation to the administration of estates, whether vacant or accepted with benefit of inventory, will, in many cases, authorise a departure from the rule requiring property of minors to bring its appraised value..... .... *ib.*

MORTGAGE.

1. The *procès verbal* of a sale, in which a mortgage is retained, made by the parish judge, acting as auctioneer, and duly recorded in the parish judge's office, is full evidence of the mortgage, which is binding on third possessors of the mortgaged property.....*Babin's Heirs* vs. *Winchester*, 460

2. The identification of the note sued on with a mortgage taken to secure its payment, may be shown by circumstantial and parole evidence, without the paraph *ne varietur*..... ..... *ib.*

3. Among the different privileges and mortgages which may exist on ships and other vessels, none is given to the wife.....*Loze* vs. *Dimitry et als.* 485

4. Ships and vessels are subject to hypothecation, though not like immoveables and slaves, but only according to the laws and usages of commerce..... ..... *ib.*

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5. The legal mortgage of the wife does not attach to ships and vessels, as the hypothecation is not effected according to the laws and usages of commerce.....*Lose* vs. *Dimitry et als.* 485

6. The provisions in the Louisiana Code, that "ships and other vessels" are susceptible of being mortgaged, is restricted to hypothecations made according to the laws and usages of commerce. In whatever cases those usages and laws would recognise the validity of an hypothecation of a vessel, our code also recognises it, and in none other.

Malcolm & Wood vs. *Schooner Henrietta et als.* 488

7. So, where a conventional mortgage on a schooner, executed by the owner, in favor of a creditor to secure the payment of a debt, and duly recorded in the mortgage office, was sought to be enforced: *Held*, that such a mortgage has no effect; and that ships are not subject to the same incumbrances which attach to immoveables, as lands and slaves, situated within the constant operation of the laws of the state..... *ib.*

8. In an action of mortgage, based on an account and debt which is shown to be grossly erroneous in its calculations and amount, the debt will be set aside for adjustment, and the contract of mortgage annulled and cancelled, as being made in error.....*Trudeau* vs. *Mather*, 554

NEW TRIAL.

1. The party demanding a new trial, on the ground of newly discovered evidence since the first trial, must show, not only due diligence before, but that the evidence is competent and material.....*Ingram* vs. *Croft*, 82

2. So an affidavit setting forth that certain depositions taken in another suit, to which the plaintiff was a party, but not between the same parties, is insufficient to obtain a new trial, on the ground of newly discovered evidence..... *ib.*

3. A new trial will not be granted on the allegation, that the verdict is contrary to law and evidence, when on an examination of the evidence, it does not appear the jury were clearly wrong.....*Williams* vs. *Bethany*, 92

4. Where the defendants claim title to certain property under an act *sous seing privé*, dated on a particular day in Baton Rouge, and the plaintiffs show, that on that very day, in another state, one hundred and seventy miles distant, the same vendor executed a power of attorney before a justice of the peace, to the same vendee: *Held*, that this fact, connected with the circumstance that this person, executing the two acts, had at that time left the state, to avoid a criminal prosecution, will be considered such violent presumption of forgery and perjury, as will require the verdict to be set aside, and the cause remanded for a new trial.....*Keys et als.* vs. *Powell & Wife*, 143

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5. Where there is not such a statement of facts as the Code of Practice requires, and the evidence not sufficiently complete to enable the court to examine the case on the merits, yet when justice requires it, the cause will be remanded for a new trial.....*McDaniel* vs. *Insall*, 241

6. It is the uniform practice of the Supreme Court, when without the fault of the appellant, his case cannot be placed before it, to have a revision of the judgment of the inferior court on the merits, and when justice requires it, to remand the cause for a new trial.....*Griffith & Wife* vs. *Miner*, 344

7. Relief will be granted on a motion for a new trial, when it will not be extended to a case in which it is sought to set aside a final judgment, in order to make a valid defence to the merits.....*Small* vs. *Flint & Thomas*, 352

NOTES.—SEE BILLS OF EXCHANGE AND PROMISSORY NOTES.

NOTICE OF PROTEST.

1. Of the fact stated in the notary's certificate, that due diligence was used by him to find the residence of the party but in vain, and of notice to him being deposited in the post-office, the certificate itself, must be taken as *prima facie* evidence.....*Preston* vs. *Daysson et als.* 7

2. The statute of the 13th March, 1827, concerning protests of bills and notes, does not change the usage or rule of the commercial law, in relation to the diligence to be used in serving *notices* of protest, but merely provides a new mode of proof of such diligence..... *ib.*

3. When the statute speaks of due diligence in giving *notice*, without defining in what it shall consist, it refers necessarily to the existing rule, according to commercial law or usage..... *ib.*

4. If the holder of a bill uses reasonable diligence to discover the residence of the endorser, *notice* given as soon as this is discovered, is *due notice* of the dishonor of the bill, within the usage and custom of merchants..... *ib.*

5. When the notary certifies, that after using diligent inquiry, without being able to find the party's residence, intended to be charged by the notice, if notice is lodged in the nearest post-office, addressed to him at the place where the contract is made, it is deemed equivalent to personal notice..... *ib.*

OBLIGATIONS.

1. Where parties enter into an obligation containing a penalty of seven thousand dollars, for the faithful payment of a sum not exceeding five thousand dollars at a particular time, on failure of the principal to comply, the surety will only be bound for the principal sum stipulated to be paid, and not the penalty.....*Reynolds, Byrne & Co.* vs. *Yarborough*, 188

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2. The penal clause in the obligation, is the compensation for the damages the creditor sustains, by the non-execution of the principal obligation.
Reynolds, Byrne & Co. vs. *Yarborough*, 188

3. But damages due for the delay in the performance of an obligation to pay money, are called interest..... *ib.*

4. In an action to recover the principal sum, and to enforce the performance of the primary obligation in a contract, the commencement of suit, puts the defendant in default, in relation to damages..... *ib.*

5. But in an action to recover damages for the non-performance of the obligation, proof of putting the party *in mora* by a special demand, must be made..... *ib*

OFFICERS.

1. Officers of the army of the United States, stationed on duty in this state, do not cease to be citizens of the states in which they resided, and exercised the rights of citizenship when called into service.
Stoker vs. *Leavenworth et al.* 390

PARTITION.

1. A partition among heirs of property really belonging to the estate inherited, although not homologated in due time, which is informal and only provisional, gives to each heir a separate and good and valid title to the property partaken by each, until annulled or changed on the application of those interested in the property of the succession.
Cooney's Heirs vs. *Clark*, 156

2. According to the laws of Louisiana, the adjustment of profits and settlement of accounts among joint owners of ships, is a necessary incident to the action of partition.....*State* vs. *Judge Watts*, 440

PARISH TAXES

1. In the division of the parish of Ouachita, and establishment of the parish of Carroll, in 1832, the law provides, that the taxes for 1831, in the part embraced by the new parish of Carroll, shall be collected by the sheriff of Ouachita, and by him paid over to the sheriff of Carroll: *Held*, that the sheriff who came into office in Ouachita, after the taxes were collected, was not responsible for their payment; and for any sums he collected as deputy of his predecessor, he is not liable except to his principal.
Clary vs. *Grayson*, 371

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PARTNERSHIP.

1. On the death of a partner leaving several surviving ones, neither has the right of suing alone as *surviving partner*, nor has one the right to sue as surviving partner for the use of them both, when there are two surviving.
David Flower vs. *Rachael O'Conner*, 194

2. In all commercial partnerships, the surviving partner, in order to receive the portion of the deceased partner, and hold it subject to the payment of the partnership debts, must make application to the Court of Probates, have such portion ascertained and valued, and give bond with security..... *ib.*

3. A surviving partner does not possess the right, until he is authorised by the Court of Probates, to sue for or receive partnership debts..... *ib.*

4. Where a partnership is composed of several partners, and by the articles of agreement, one of them is to be a silent partner, the others cannot, by mutual consent, before its expiration, dissolve the partnership, without the consent of the silent partner..... *Stevenson* vs. *Shields*, 433

5. Where a partner sues the acceptor of a bill, endorsed by the payee to the partnership, and the plaintiff sues in his own name for the use of the firm, which he alleges is composed of himself and another, but is dissolved by mutual consent, and it appears by the articles of partnership, there was a silent partner, who had not consented to the dissolution: *Held*, that the action cannot be maintained, because the interest of the silent partner in the bill, by the endorsement to the firm of which he was a member, could not be divested without his consent..... *ib.*

POSSESSION.

1. Where a person has a right of possession, and suffers his adversary to remain in peaceable possession more than a year, he forfeits his right to a possessory action, and has no remedy but the petitory.
Yarborough vs. *Palmer*, 153

2. The right of possession and actual possession, authorise the possessor to bring an action of trespass, and it is the province of the jury to assess the damages..... *ib.*

3 The principle that possession of a part of a tract of land, is possession of the whole, and sufficient to prevent the adverse party from acquiring absolute title by prescription, cannot prevail over the adverse possession of the other party, under a title of higher dignity, and a definite location by authority of the sovereign. .....*D'Arby's Heirs* vs. *Blanchet's Heirs*, 256

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PRACTICE.

1. Under the prayer for general relief, suited to the nature and justice of the case, the Supreme Court will render such judgment as would be given in a new suit, to avoid circuity of actions.....*Smith* vs. *Corcoran et als.* 46

2. When on an attentive examination of the evidence, it does not warrant the court to interfere with the verdict, the case will not be remanded..... *Greenfield* vs. *Manning et als.* 56

3. The reference to the record of a suit to show that it interrupted prescription, is insufficient to enable the Supreme Court to determine whether prescription was really interrupted.....*M'Micken* vs. *Weems, Curator, &c.* 66

4. When the evidence is insufficient to determine the fact of the interruption of prescription, but which can be ascertained, justice requires that the case be remanded for a new trial..... *ib.*

5. Forfeited penalties are recoverable on motion, without the formality of any pleadings.....*State* vs. *Hay et als.* 78

6. The plea of the general issue, and the plea of prescription, are not inconsistent with each other.....*Ingram* vs. *Croft*, 82

7. Where a married woman is sued as heir, it is necessary that the husband be cited to assist his wife in defending the suit.
Lanoue vs. *Reed et als.* 112

8. Under the prayer for general relief, when the evidence shows an agreement of the defendant to pay a certain sum, as the balance of the price of a slave, the court will consider itself authorised to give effect to the agreement, and terminate the controversy between the parties, although not alleged or asked for in the petition.....*Bradford's Heirs* vs. *Clark*, 147

9. Where fraud and simulation, or lesion, are not alleged, a judgment disregarding a written sale of a slave, will be declared erroneous, and be annulled and reversed..... *ib.*

10. When the record does not furnish a certificate, either by the judge or clerk, that it contains all the evidence on which the cause was tried, nor a statement of facts, it cannot be examined on its merits, but the court will decide on the questions of law, presented by the bills of exception in the record..... *Heirs of Kimball* vs. *Heirs of Lopez*, 173

11. The omission of the defendant to deny the plaintiff's capacity to sue, waives the right to do so, and dispenses him from the necessity of proving it, even when the demand is denied. The same consequence should follow when there is a legal presumption of its justice being confessed.
Lopez et als. vs. *Bergel*, 178

12. Pleas or exceptions that are not declinatory, need not be pleaded *in lemine litis*.....*David Flower* vs. *Rachel O'Conner*, 194

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13. Where parties agree to submit the matters in controversy between them, in a suit pending, to judicial arbitrators, it by no means follows, that the suit is to be dismissed without the consent of the plaintiff, on the motion or exception of the other party.....*W. & D. Flower* vs. *O'Conner*, 198

14. A plea of usury is not considered a peremptory exception, going to extinguish the action, and will not be received pending the trial, after the jury is sworn..... ... . *ib.*

15. The possession of accounts rendered to the defendant when called for, may be evidence against him that such accounts were rendered, *i. e.* to prove *rem ipsam.* On refusal to produce them, the plaintiff has a right to give his affidavit in evidence to the jury, describing their contents and calling for the documents..... *ib.*

16. When an application is made for the production of documents in the possession of the opposite party, unaccompanied by affidavit, and duplicates of them are already in court, the order to produce them will be refused..... *ib.*

17. The plaintiff may compel the production of accounts or documents, furnished by him in the course of business, and which are in the hands of the opposite party, although they might not be legal evidence in the cause when produced, but are open to every legal objection..... *ib.*

18. Usury may be taken advantage of on the trial, even when not pleaded, if it appears from the petition or evidence offered by the plaintiff, that more than ten per cent. was stipulated...*W. & D. Flower* vs. *O'Conner*, 198

19. A waiver of the right to have the evidence taken down by the clerk, is not a waiver of the right to have a statement of facts, so as to enable the party to prosecute an appeal.....*Insall* vs. *M'Daniel*, 241

20. The voluntary waiver of the plea of prescription, by a party in a judicial proceeding, especially when accompanied by a concession on the part of his adversary, made in consequence thereof, is the strongest presumption of the renunciation of the right itself...*Coon* vs. *Brashear et als.* 263

21. The plaintiff has a right on proving his demand, to have a judgment by default made final, without waiting for it to be called regularly on the docket.....*Small* vs. *Flint & Thomas*, 352

22. Entering a formal appearance of a defendant in a civil suit, is unknown to the practice in Louisiana.....*Stoker* vs. *Learenworth et al.* 390

23. Where a motion is made to dismiss the suit, for want of service of the petition on the defendant, in the French language, his vernacular tongue, the plaintiff was permitted at the same time to amend, by filing a copy of the petition in French, and having it served on the defendant.

Thomas vs. *Baillo*, 410

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24. The Code of Practice does not pronounce the absolute nullity of a petition or pleadings defective in form only; the nullity is relative, and the party has a right to amend his pleadings.....*Thomas* vs. *Baillo*, 410

25. The court is forbidden to give any weight to evidence in a record, which is foreign to the question at issue..... *ib.*

26. Where the judge *a quo* states the law in the way most favorable to the defendant, in his charge to the jury, the latter has no cause to complain, and the verdict will not be disturbed..... ..*Stewart* vs. *Paulding*, 506

27. Where the syndic makes himself a party plaintiff to a suit, in the place of the original one, who is a ceding debtor, without objection on the part of the defendant, he has a right to contest the case and receive judgment.....*Tythill & Fuller* vs. *Emerson*, 593

28. The objection to the plaintiff's capacity to sue, comes too late, after answer to the merits, and the jury are sworn on the trial..... *ib.*

29. Where the plaintiff sues as the heir of his wife, and his capacity to sue is not denied by the pleadings, he is not required to prove his wife's death.....*Featherstone* vs. *Robinson*, 596

30. Irregularity and impropriety in the form of action, is waived by pleading to the merits, and proceeding to trial without making the objection..... ..... *ib.*

PRESCRIPTION.

1. An alteration within the time allowed to acquire a servitude by prescription, which is made on the eave of the roof of the house of A, and which had a tendency to lighten the burden of the servitude, is not considered as an interruption so as to prevent prescription from running.

Vincent vs. *Michel*, 52

2. The reference to the record of a suit, to show that it interrupted prescription, is insufficient to enable the Supreme Court to determine whether prescription was really interrupted.

M'Micken vs. *Weems, Curator, &c.* 66

3. When the evidence is insufficient to determine the fact of the interruption of prescription, but which can be ascertained, justice requires the case should be remanded for a new trial..... *ib.*

4. Proof of possession is indispensable to support a title, based on the plea of prescription..... ...*Green* vs. *Hudson's Syndics*, 120

5. The vendor from whom the defendant's title is derived, is an incompetent witness, to prove the possession of the latter, so as to form the basis of a title by prescription..... *ib.*

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6. The defendant's acknowledgment and promise to pay his note, before and after the lapse of *five* years from the time it became due, and before suit is brought, will take the case out of prescription, when the action would otherwise be barred.....*Lopez et als.* vs. *Bergel*, 178

7. Where land has been possessed, even under an erroneous location, for more than thirty years in conformity to it, in the presence of the adverse claimant, the plea of prescription will prevail, and the possessors quieted in their possession.....*D'Arby's Heirs* vs. *Blanchet's Heirs*, 256

8. Prescription when once acquired, may be either tacitly or expressly renounced.....*Coon* vs. *Brashear et als.* 265

9. Where a party once voluntarily renounces prescription in his favor, in the course of the trial in the inferior court, he cannot renew it, or avail himself of it in the Supreme Court..... *ib.*

10. In an action of warranty, prescription only runs from the date of eviction. If the action is commenced within ten years, it is in time to prevent prescription.....*Babin's Heirs* vs. *Winchester*, 460

11. The action of mortgage is not barred by prescription, when commenced within ten years from the time when the debt became due and payable..... *ib.*

12. Where the defendant lives alternately in Kentucky and Louisiana, prescription only runs for the time he is actually in the state.

Guillet vs. *Erwin*, 580

13. So where two years had elapsed, from the date of the sale until institution of suit for redhibitory vices in slaves, and it was shown the defendant had only been ten months in the state, during that time: *Held*, the action was not prescribed by the lapse of one year..... *ib.*

REDHIBITION.

1. Redhibitory defects or vices, which are made known by the vendor to the vendee, at or before the sale, cannot be urged in evidence, or in any manner set up against the sale.....*Hawkins* vs. *Brown et al.* 417

2. The redhibitory action for the rescission of the sale and return of the price of a slave, will be sustained for any vice or defect which renders the slave either absolutely useless, or its use so inconvenient and imperfect that it must be supposed the buyer would not have purchased with a knowledge of the vices.....*Icar* vs. *Suares*, 517

REMOVAL OF CAUSES.

1. Filing a plea, exception or answer, is the only entry of appearance required; and in an application for the removal of a cause to the United

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States District Court, filing the petition for such removal, is evidence of the defendant's appearance.....*Stoker* vs. *Leavenworth et al.* 390

2. When a proper case is made for the removal of a cause to the United States Court by the defendant, no judgment by default is permitted, but the court is bound to order the removal *instanter*..... *ib.*

3. Exceptions or counter affidavits are not allowed against a proper application of a defendant, for the removal of the suit against him to the United States Court..... *ib.*

4. In an application for the removal of a cause from the State to the United States District Court, where the defendant alleged the plaintiff was a citizen of a certain parish, *as appears by his petition*, which states also that the plaintiff is a resident: *Held*, to be a sufficient allegation of citizenship, in relation to the plaintiff..... *ib.*

RES JUDICATA.

1. A judgment quashing an execution, has not passed in *rem judicatem*, when the matter in dispute is appealable, and a year has not elapsed from the date of it to the time of trial, when it is offered in evidence to show the writ erroneously issued and was properly quashed.....*Escurix* vs. *Daboval*, 575

SALE.

1. Without an assessment of a state tax, the officer has no warrant or authority to sell non-resident's land therefor, and which is indispensable to make out a valid title under a collector's sale for taxes.

Smith vs. *Corcoran et al.* 46

2. The recitals in the treasurer's deed, to land sold for taxes, is no evidence that it was legally assessed, as the fact of assessment was not within his cognizance..... *ib.*

3. Where the conduct of a bidder at a sheriff's sale, is of such a character as to prevent competition in bidding and deprive the owner of a higher price for his property than would otherwise have been obtained, the owner may have the sale annulled, and such damages awarded against the purchaser as a jury may assess to be reasonably sustained.

Liles vs. *Rhodes*, 87

4. Where the sale made by a sheriff is rescinded, on account of the improper conduct of the buyer at the time of sale, the owner must refund the price which was paid..... *ib.*

5. But where the owner of land sold at sheriff's sale, obtains a rescission of the sale, with damages against the purchaser, the latter may go in compensation of the price which is to be refunded..... *ib.*

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6. Where the payee of a promissory note, payable to order, transfers it in writing, on the back of the instrument, for twenty per cent. discount, it will be considered a sale, not an endorsement in which the purchaser will be considered as having taken the risk of the solvency of the maker, without recourse on the transferror; and such a contract is in its nature aleatory, and not usurious.....*Romero et als.* vs. *Segura*, 307

7. Where the sale of a promissory note by the payee, who is in insolvent circumstances, has been made for one-fifth less than the amount promised on the face of it, such sale may be rescinded by the creditors of the insolvent; but they would be bound, first to refund the purchase money, when there is no evidence of fraud..... *ib.*

8. Where the creditors of an insolvent succession, in which there are minors interested, who have accepted with the benefit of inventory, meet and concur with a family meeting, in behalf of said minors, that the property be sold on certain terms and credits, the sale will be legal and confer a valid title on the purchasers, even if it sell for less than the appraised value.

Towles's Administratrix vs. *Weeks et als.* 311

9. The purchasers of a debt, at sheriff's sale, stand in the same relation to the person who owes it, as the creditor of the latter would or did before the sale; and whatever defence would avail the original debtor against his creditor, is equally valid against his vendees.....*Andrus et als.* vs. *Chretien*, 318

10. In a sale *per aversionem*, with reference to known definite boundaries, they will control the enumeration of quantity; and the purchaser is not entitled to a diminution of price, proportioned to a diminution of the quantity.....*Gormley et al.* vs. *Oakey et als.* 452

11. So where a sale is made, with reference to a natural boundary on one side, and on the other two sides by lands of the adjoining proprietors, and the length of all the lines are given on a plan annexed to the conveyance, and the whole is sold for a given sum: *Held*, that it is a sale *per aversionem*, and the purchaser bought whatever is embraced within those limits and nothing more, although *less* than the quantity specified as sold in the act of sale..... *ib.*

12. Where the bidder at an auction sale fails to comply with his bid, the seller may, after the customary advertisement, at the end of ten days, re-sell the property, and the bidder is liable for the deficiency in price and costs of sale, between the first and second adjudication.....*Stewart* vs. *Paulding*, 406

13. Neither the bidder or vendor is obliged to perform his part of the terms of an auction sale, until requested to do so by the other..... *ib.*

14. The vendor of an auction sale, has the choice of two remedies, in case of non-compliance by the bidder, *i. e.*, to demand the price, or have the property re-sold on account of the latter..... *ib.*

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15. In an absolute or defeasible sale, the property does not pass from the vendor, with regard to third persons, until tradition takes place; but before the tradition, the vendee has *jus ad rem*, though not *in re*.

Garrilson vs. *His Creditors*, 551

16. So where a bill of sale is taken on a steam-boat, to secure the payment of a sum of money, executed between the parties in the State of Tennessee, and registered in a court there, and the boat is afterwards brought to this state and sold by the syndic of the creditors of the owner: *Held*, that the bill of sale is valid, although defeasible on payment of the money, and that the sale by the syndic changed the remedy, without affecting the creditor's rights, who is still entitled to the proceeds..... *ib.*

17. In a sale of property under execution, on twelve month's credit, the purchaser is required to give bond for the whole amount of principal, interest and costs due on the day of sale, as if made for cash; and on that aggregate sum, the same rate of interest is allowed in the bond as that on the original debt from the day of sale.....*Hilligsberg* vs. *Holmes*, 565

SEIZURE.

1. The seizure under a writ of *fieri facias*, of a schooner or other moveable property of the husband, takes it from his possession, so that a subsequent judgment against him, by his wife, with her legal mortgage; cannot affect it.....*Loze* vs. *Dimitry et als.* 485

SELLER AND BUYER.

1. Where the defendant purchased a sugar mill of the plaintiff, who is a merchant, part of which broke in pieces on being put up, the latter is not responsible for the defects, unless he knew it was of bad quality, and represented it as good.....*Barclay* vs. *Conrad et als.* 261

2. The buyer cannot set up redhibitory defects in the thing sold and purchased by him, when sued for the price, after having sold it to another. By selling it he affirms the first sale..... *ib.*

3. Where a merchant sells a sugar mill, which proves defective after being put up, he is still entitled to recover the price, unless there was some concealed defect; or he had represented it as sound when not so..... *ib.*

4. Where the bidder to whom property is adjudicated, fails to comply with the terms of sale, the seller may, at the end of ten days after the customary advertisements, re-sell the property, by re-advertising it according to law ten days, and the bidder is liable for the deficiency in *price*, between the first and second sale.....*Stewart* vs. *Paulding*, 506

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SEQUESTRATION.

1. A petition for an order of sequestration, is not an amendment of the original pleadings; but is in a manner wholly unconnected with them, and does not require the leave of the court to file it...*Leavenworth* vs. *Plunket*, 341

2. To obtain an order of sequestration of a tract of land, to prevent the possessor from committing waste and using the fruits and revenues, the affidavit must set forth a *legal* cause, that the party obtaining it has *good ground* of apprehension, &c. It is insufficient to state he has *ground* to apprehend, &c..... *ib.*

SERVITUDE.

1. A right of servitude which rests solely on the acquiescence of the plaintiff, in the burden imposed on his property, by suffering without complaint, the drip from the defendant's house, to fall on his lot or grounds for ten years and upwards, is acquired by prescription.....*Vincent* vs. *Michel*, 52

2. Where the possession or continuation of the servitude of right of drip from the eaves of A's house, on the lot of B, is proven to have existed more than ten years, B is barred from bringing his action of damages, or to abate it as a nuisance against A..... ..... *ib.*

SLAVES.

1. In a conflict of laws between two states, where a testator in Georgia bequeathed to certain of his slaves their freedom, to take effect five years after his death, and before the expiration of the five years the testamentary executor brings the slaves to Louisiana; and it is shown that, at the time of the bequest of freedom the laws of Georgia prohibited the manumission of slaves, except by application to the legislature: *Held*, that the bequest in the will being prohibited by the laws of the State where it was made, is *null and void*.....*Mary, f. w. c.* vs. *Morris et als.* 135

2. The bequest of liberty to slaves which is made in contravention of the law of a state, enacted for the security of the public peace and good order of the community, is absolutely null and void; and such slaves do not, *ipso facto*, become free under the will on being brought into this State, where slavery is tolerated, but in which slaves may be manumitted by will. *ib.*

3. In a suit for freedom, when the question is *libera vel non*, and the plaintiff being, from her color and possession of the defendant, presumed a slave, the burden of proving freedom devolves on the plaintiff..... *ib.*

4. Proof of the residence of a slave, in a free state, the constitution of which forbids slavery, during the space of two or three years, unconnected with any other proof, is insufficient in law to entitle such slave to his freedom. *Louis, f. m. c.* vs. *Cabarrus et als.* 170

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5. The residence of a slave in a state where slavery is forbidden, contrary to the will of his master, does not deprive the latter of his right to his property.....*Louis, f. m. c.* vs. *Gabarrus et als.* 170

6. The consent of the owner of a slave that he should go and perform work and labor in a free state, does not, of itself, free the slave, though this may be effected by the slave's going there under this permission..... *ib.*

SUCCESSION.

1. The succession of the son dying without issue, leaving only his mother to inherit, becomes her paraphernal property, and she has a right to administer it without the interference of her husband.

W. & D. Flower vs. *O'Conner*, 198

2. The acceptance of the succession of the son by the mother, with the consent of her husband and the benefit of inventory, is an engagement as relates to creditors, that if she did not administer it according to law as beneficiary heir, she would be personally liable for the debts..... *ib.*

3. Where a succession is administered as an insolvent one, and there are judgment and mortgage creditors, they have a right to demand a forced sale for cash; and in the event of the property not bringing its appraised value, a credit of one year must be allowed.

Towles's Administratrix vs. *Weeks et als.* 312

SURETY.

1. The surety in an attachment bond, executed by the plaintiff, is not liable to an action by the intervenor, although the latter may recover in the attachment suit.....*Raspillier* vs. *Brownson*, 231

TRANSACTIONS.

1. Transactions have, between the parties, the authority of the thing adjudged; and where the parties compromise generally on all differences, the titles which are unknown and afterwards discovered, are not cause for rescinding the transaction, unless they have been concealed purposely by one of the parties.....*Grounx et als. f. p. c.* vs. *Abat's Executors*, 17

2. And where the renunciation of all claims and demands, in an act of compromise or transaction, is full and explicit, and no mention is made of a latent title to certain property included in the transaction, but no evidence showing that the title was concealed on purpose by the party, the transaction will not be rescinded..... *ib*

TRESPASSER.

1. Where a party by contract has a right to certain premises, on performance of a condition precedent, and he fails, but enters on the premises in

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pursuance of his contract, and the adverse party suffers him to remain in possession more than a year; if the latter afterwards enters and takes forcible possession, he will be considered a *trespasser*, and liable to damages.

Yarborough vs. *Palmer*, 153

2. Purchasers of property from persons having the apparent right to sell, are not to be considered as trespassers.....*Spotts* vs. *Lange et als.* 182

TUTOR.

1. The mother or surviving parent, as tutor or tutrix, may refuse the administration of her minor children's property, yet retain the superintendence of them, and the care of their education.

Berluchaux vs. *Berluchaux et als.* 539

2. The person appointed to manage and administer minor's property, on the refusal of the natural tutrix to take that office, is termed a tutor *ad bona;* and this appointment may be made to minors of a person other than the natural tutrix, even when she is present and residing in the state..... *ib.*

3. Where a surviving parent resides in a foreign state or country with his children who inherit property in this, perhaps on proof that he had complied with the laws of the place of his residence, and had obtained full authority, as tutor, to administer his wards' property, he might appoint an attorney in fact to represent their interests, at least so far as to make partition of a succession held in common with co-heirs residing here..... *ib.*

4. According to the Spanish law, the tutorship of the mother is required to be conferred and confirmed by the Judge in the same manner as of any other near relation on whom the office is cast by law..... *ib.*

5. The father may confer the tutorship by will, which supersedes any appointment by the judge..... *ib.*

6. It is the duty of the relations of a minor, residing in this state, to provoke the appointment of a tutor, whether the minor be or be not domiciliated therein..... *ib.*

7. Where a minor resides in a foreign country and inherits property in this state, a tutor *ad bona* must be appointed to make partition or administer it..... *ib.*

8. A mother residing in a foreign country with her minor children, who inherit property in this, on coming here would be preferred to all others in obtaining the administration of their inheritance..... *ib.*

9. It is a general principle, admitted by the comity of nations, that the tutor of a minor, deriving his authority from the law of their common domicil, has a right to exercise the actions of his pupil every where.

Berluchaux vs. *Berluchaux et als.* 545

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The *law* 9, *tit.* 16, *Partida* 6, adopts the system of the Roman law in the 118th novel of Justinian, requiring the mother who accepts the tutorship of her children, other than that conferred by testament, to give security.

Berluchaux vs. *Berluchaux et als.* 545

VERDICT.

1. Where all the facts and circumstances of a case are placed before the jury who make up their verdict on all the evidence adduced, with a knowledge of the parties, they are considered much more competent to decide between the parties litigant than the court, which is bound to respect their verdict, unless clearly erroneous in law, or manifestly contrary to, or without legal evidence.....*Hewet & Co.* vs. *Wilson et als.* 71

2. A verdict found on the plea of fraud and collusion, is entitled to particular attention, because they are the peculiar objects for the cognizance of a jury.....*Burroughs* vs. *Nettles*, 113

3. Where a mass of facts, relating to the settlement of a succession and the accounts of a mercantile firm, and where fraud and circumvention is charged, are all submitted to a jury, who appear to have carefully allowed the debits and credits between the parties, their verdict will not be disturbed.

W. & D. Flower vs. *O'Conner*, 198

4. On a mere matter of fact, submitted to a jury, where the evidence does not show the verdict to be clearly wrong, the verdict and judgment will not be disturbed.....*Lapointe* vs. *Guidry*, 246

5. The Supreme Court can judge only of the effect of the whole evidence of the case, taken together, and whether the verdict of the jury is manifestly against, or without legal evidence. If not of this character, it will not be disturbed.....*Coon* vs. *Brashear et als.* 265

6. On an issue of fraud, the verdict of the jury is entitled to great weight; yet, on examining the evidence, if it appears the demands of justice would be best promoted by another trial, the cause will be remanded.

Castel & Devaux vs. *Their Creditors*, 575

WAGES.

1. Where a workman sues to recover his wages, at a stipulated hire per month, as a brick-layer, and evidence is introduced, without objection, to prove the usual wages of that class of mechanics, the jury are the judges of the value of the work charged as having been done, on the evidence before them.....*Coon* vs. *Brashear et als.* 265

2. In a suit to recover wages, at a stipulated hire per month, by a mechanic, it is sufficient for him to prove his contract and the length of time he was in the defendant's employment..... *ib.*

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WARRANTY.

1. The vendor is bound in warranty to his vendee, when his deed of sale does not exclude it. His obligation extends at least so far as to require him to refund, with interest, in case of eviction.....*Green* vs. *Hudson's Syndics*, 120

2. Where two purchasers join in the purchase of a boat, its load and cargo, and one acts as agent of the other, when sued jointly for the price, the one who authorised the other to act as his agent cannot call his co-defendant in warranty.....*Spotts* vs. *Lange & Longuepe*, 182

3. The administrator of an estate is the legal vendor of the property at probate sale, whose declarations are to govern in regard to its conditions and terms, and the legal warranty resulting therefrom.

Hawkins vs. *Brown et als.* 417

4. The sale of property legally made by the administrator, binds the heirs in warranty..... *ib.*

5. The vendor, when called in warranty, in a sale *per aversionem*, is not bound to make good the quantity of land specified in the act of sale, but only the extent and quantity contained within the defined limits, by which he sold.....*Gormley et al.* vs. *Oakey et als.* 452

6. The vendor is not bound to warrant what he never sold; and when the vendee has not been evicted of any part of the land sold, which was conveyed by certain definite boundaries, he cannot recover of his warrantor, although the quantity actually sold, was less than that set forth in the deed. *ib.*

WILL.

1. The Spanish law required as an indispensable solemnity to the validity of a testament or will, that it should be signed by the testator and witnesses, or by some one of the witnesses for him or them at least.

Vidal's Heirs vs. *Duplantier*, 37

2. The principle has been settled, that according to the Spanish law, it is not absolutely necessary for the validity of a testament or will, that all the required solemnities should appear on the face of the testament itself; but that some apparent defects may be cured or supplied by proof, when the instrument is offered for probate..... *ib.*

3. In the construction and interpretation of wills, the intention of the testator must be sought in the *words* he has used in the will, and not *aliunde*.....*Theall* vs. *Theall et als.* 226

4. Constructions and interpretations of wills, are not resorted to for the discovery of the testator's intention, when he has used none but plain unequivocal expressions..... *ib.*

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5. A testator must be presumed to know that his own property alone, can be disposed of in his will..... *ib.*

6. So where a community of property exists, and the testator in his olographic will, declares he wishes the rest of *his property* (after making legacies) both real and personal divided as follows: "*One half to his wife and the other half to his brother's children, &c: Held*, that the wife first takes half the community, and then one half of the other half, after deducting debts and legacies..... *ib.*

7. The Civil Code of 1808, required all the formalities in a will to be complied with, before turning aside to other acts, but did require mention of these in the will.....*Featherstone* vs. *Robinson*, 596

WITNESS.

1. Where a witness swears from his *impressions*, that a fact is so and so, it is insufficient, and the testimony should be rejected.....*Ingram* vs. *Croft*, 82

2. The testimony of one witness to a signature, who swears he saw the party sign, and whose credibility is not impeached, will not be invalidated by the negative statements on oath of two witnesses, made on a comparison of hand writing of the party, and his signature to documents on file in the suit.....*Bell* vs. *Norwood, Administrator*, 95

3. Where the amount of a debt, or an agreement to pay money, exceeds the sum of five hundred dollars, the testimony of one witness alone, is insufficient to prove it..... *ib.*

4. In a suit involving the question of limits and boundaries between two tracts of land, where the parish surveyor, called as a witness, was asked the following question: "were you called upon as a surveyor of the state, to fix the boundaries between the parties, under the provisions of the Civil Code, where would you establish it with the lights before you?" *Held*, that the question was illegal, as the answer would have been to decide at once the controversy between the parties, as well questions of law as of fact, and cut the knot, which courts and juries had labored years to untie.

Bowman vs. *Flower*, 106

5. Surveyors when called as witnesses, may properly be questioned as to the appearance of old lines, marks upon trees, and similar facts connected with their profession..... *ib.*

6. The vendor from whom the defendant's title is derived, is an incompetent witness to prove the possession of the latter, so as to form the basis of a title by prescription.....*Green* vs. *Hudson's Syndics*, 120

7. The vendor is an incompetent witness on the ground of interest, for a party deriving title from him, even when his deed to his vendee, contains no clause of warranty..... *ib.*

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8. A sheriff cannot be called as a witness to prove what proceedings took place at a certain sale made by him, when the return made on the execution is silent, or stated the execution had been stayed by order of the District Court.....*Heirs of Kimball* vs. *Heirs of Lopez*, 173

9. An attorney at law, receiving or to receive a per centage on the sum collected or recovered, or who is to receive a stipulated fee, is not thereby disqualified, on the score of interest, from testifying in his client's cause. *W. & D. Flower* vs. *O'Conner*, 198

10. In the cross examination of plaintiff's witness, the defendant cannot require him to detail declarations of the defendant, made out of the presence of the plaintiff, and which make evidence against him..... *ib.*

11. On cross examination, plaintiff's witness becomes that of defendant, and the latter cannot make his own declarations, made out of the presence of the other party, evidence in favor of himself..... *ib.*

12. In a suit for a separation from bed and board, the children, both majors and minors of the plaintiff, are competent witnesses to testify in her behalf.....*Savoie* vs. *Ignogoso*, 281

WORK BY THE JOB.

1. Where the plaintiff, being dismissed by the defendant from finishing a certain job of work, relies on the promise of the latter, to have an estimation made of the work actually done and pay accordingly, but who neglected to cause such appraisement to be made, he ought to be bound by the estimation of appraisers appointed by himself: *Held*, that the plaintiff must show, either that the defendant concurred in the appointment of the experts, or that he was put legally in delay in relation to his promise, in order to make it binding.....*Bradley* vs. *Proctor*, 514

WRIT.

1. The writ of execution must pursue the judgment. But if the judgment be in itself vague and uncertain, it may be rendered certain by reference to the pleadings.....*Williams* vs. *Kelso*, 406

2. When a writ of possession is directed to the sheriff, a copy of the judgment and the petition to which it refers, must accompany the writ, in order that the officer may not be mistaken in the premises of which he is to give possession..... *ib.*